REME COURT. U. S.

OCT 19 1968

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 666

HELEN CORINNE SCALES TRICE, Executrix,
Petitioner,

vs.

COMMERCIAL UNION ASSURANCE COMPANY, LTD., Et Al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

FYKE FARMER,
511 American Trust Building,
Nashville, Tennessee 37201,
Attorney for Petitioner.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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To the United States Court of Appeals for the Sixth Circuit.

Petitioner, Helen Corinne Scales Trice, Executrix under the Will of Joe W. Scales, Deceased, asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered in this case on July 18, 1968. The Court's opinion is reported at **397 F. 2d 889**. A petition to rehear was filed by petitioner and denied on September 4, 1968.

GROUND ON WHICH JURISDICTION OF COURT IS INVOKED.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Is the judgment of the Court of Appeals a denial to petitioners of the right of trial by jury guaranteed by the Seventh Amendment?

CONSTITUTIONAL PROVISION INVOLVED.

Amendment VII—Civil Trials.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE.

This lawsuit was a diversity action instituted in the United States District Court for the Middle District of Tennessee by petitioner's testator, Joe W. Scales, to collect the insurance on a feed mill known as Pulaski Mill & Elevator Company. The mill was damaged by fire on July 14, 1956. Joe W. Scales, the original plaintiff, was the owner of the property which was insured by seven companies, the defendants-appellees below.

The insurance policies involved in the lawsuit provided a total coverage of $25,000.00 on buildings and an additional coverage of $25,000.00 on machinery and equipment.

The plaintiff, Joe W. Scales, died during the pendency of the case in the district court. The suit was revived in the name of Helen Corinne Scales Trice, a daughter of the said Scales and the executrix under his will.

Among other defenses, the insurance companies contended that the insured Joe W. Scales procured the property to be burned in order to collect the insurance and filed a false and fraudulent proof of loss.

The case was tried before a jury on the plaintiff's demand in May, 1962. The court submitted separate questions or issues to the jury. The jury answered that the insured Joe W. Scales did not procure the mill to be burned and was not guilty of fraud, false swearing, misrepresentation or concealment in the proof of loss affecting the policies insuring buildings, machinery and equipment. They returned a verdict in favor of petitioner for $25,000.00, the policy limits on the buildings, and $20,000.00 on machinery and equipment clauses, wherein the policy limits totaled $25,000.00.

The trial judge, after entering judgment on the verdict, set aside the judgment and verdict on the ground of the

weight of the evidence and upon the further finding of prejudicial misconduct by petitioner and her counsel and granted a new trial on both issues of arson and fraud and false swearing. A lengthy memorandum setting forth the trial court's findings and conclusions was handed down on Dec. 20, 1962 and was reported as **Thurman Smith, Trustee, et al. v. Insurance Company of North America, et al., 213 F. Supp. 675** (Appendix page A-19).

On petitioner's appeal from the order granting the new trial, the Court of Appeals affirmed the judgment holding that there was no abuse of discretion and saying:

> "A review of the record in this case reveals that there was no abuse of discretion by the Trial Court in granting the defendants' motion for a new trial. There was substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing in the proof of loss and that he had participated in procuring of the burning of the subject property."

The opinion of the Court of Appeals on the first appeal is reported as **Trice v. Commercial Union Assurance Company, 334 F. 2d (1964), 673, cer. den. 380 U. S. 915, 13 L. ed. 2d 801, 85 S. Ct. 895** (Appendix page A-10).

On the second trial the jury returned a verdict that they were unable to agree as to the arson issue but found for the defendants on the issue of fraud, false swearing and wilful misrepresentation and assessed a penalty of $5,000.00 against the plaintiff for bad faith in suing to collect the insurance. The court entered judgment that the arson issue remained undetermined, that the plaintiff take nothing and that the defendants recover the $5,000.00 penalty. Plaintiff's motion for judgment notwithstanding the verdict in accordance with her motion at the close of the evidence for a directed verdict upon the ground

that the defendants had introduced no substantial evidence upon which a verdict could be rendered in their favor was denied. Also her motion to reinstate the verdict of the jury on the first trial was denied.

Petitioner appealed from the judgment in favor of the defendants and all prior orders unfavorable to her contentions. The Court of Appeals affirmed the final judgment saying:

> "The executrix contends that we erred in our decision on the first appeal in holding that the District Judge did not abuse his discretion when he granted the motion for a new trial on the ground that the verdict of the jury was manifestly against the great weight of the evidence. The District Judge had also based his ruling on prejudicial misconduct of counsel. The executrix asks us to overturn our decision on the appeal and reinstate the original verdict and judgment in her favor and thus render nugatory the proceedings and judgment of the District Court upon remand. We find no merit in this contention.
>
> * * * * * * *
>
> "The evidence on which the District Judge relied in granting the motion for a new trial is outlined in his comprehensive opinion, 213 F. Supp. 675, and it is not necessary for us to detail it here. There is nothing in the record which would warrant a change in our opinion, and we adhere to it."
>
> **(Appendix, page A-1, et seq.)**

ARGUMENT.

In **Tennant v. Peoria & P. U. R. Co., 321 U. S. 529, 64 S. Ct. 409, 88 L. Ed. 520,** rehearing denied in **321 U. S. 802, 64 S. Ct. 610, 88 L. Ed. 1089,** this Court declared the law as follows:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

It is hard to see how a rule of law could be more plainly and succinctly stated than the above. Nevertheless, the trial judge in his opinion setting aside the jury on the first trial of this case did reweigh the evidence and set aside the jury verdict merely because he thought the jury could have drawn different inferences or conclusions and because he felt that other results were more reasonable. This will be plain from reading the judge's memorandum in the appendix.

And the Court of Appeals affirmed the grant of a new trial merely because there was substantial evidence in the record that would have supported a contrary verdict. Petitioner has quoted an excerpt from the first opinion of the Court of Appeals which shows that was the sole basis for its affirmance of the grant of the new trial. Never before in any reported case that has been cited, or which petitioner's counsel after diligent research has been able to discover, has a verdict of a jury been overturned merely upon the ground that there was substantial evidence which would have supported a verdict of the jury contrary to the one it reached. It is impossible to reconcile the decisions of the courts below in this case with the rule declared by this Court in **Tennant v. Peoria** except, as stated by the

Court of Appeals in its final decision, the trial judge also based his ruling on a finding of prejudicial misconduct of counsel. It is that finding concurred in by the Court of Appeals which constitutes the denial to petitioner of her right to the trial of the issues in this case by a jury.

The particular clause of the Seventh Amendment which is involved in the question raised by petitioner for decision by this Court is "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The finding by the first trial judge (concurred in by the Court of Appeals in its latest opinion) was that plaintiff-appellant below (petitioner here) and her attorney were guilty of misconduct in interviewing a witness whose discovery deposition had been taken by the defendants and procuring from him a repudiation of his testimony. Petitioner says that if this finding (see Appendix page A-50) be held to be a conclusion of law, it is unsound. On the face of the opinion it appears that the conduct of plaintiff and her attorney was entirely proper. In **Harrington v. United States, 267 Fed. 97, 101,** the Court of Appeals for the Eighth Circuit said:

> "It is not an unlawful attempt to influence or impede a witness, or the due administration of justice, for one to seek to obtain from the witness a statement of facts as he believes them to be, without the exercise of undue influence, even though such a statement may conflict with prior testimony given by the one making the statement."

By Canon 39 of the Canons of Professional Ethics adopted by the American Bar Association, it is provided:

> "A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing

counsel or party. In doing so, however, he should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammeled conduct when appearing at the trial or on the witness stand."

The principal fact tried before the jury in this case was whether James Nelson told the truth in the discovery deposition when he said he was hired by Joe W. Scales to set fire to the mill and that he did set fire to the mill, or whether he told the truth when he testified on the witness stand that this story was a pure fabrication. The jury on the first trial, after having heard all the evidence concerning Nelson's repudiation of his first statement, found that Joe W. Scales did not procure the burning of the mill. The jury on the second trial failed to agree. The fact tried by the jury, in this case has been re-examined by the courts and found contrary to the finding of the jury. On this basis, the courts below have held that the verdict of the jury cannot stand.

By the Seventh Amendment the fact tried by the jury and found in petitioner's favor could not be re-examined by the courts below and found against her. But, this is precisely what has been done in this case.

What was the testimony of Nelson that he repudiated after plaintiff-appellant and her counsel talked with him during a recess in the taking of his deposition by the insurance companies? It was condensed by the trial judge as follows:

> "13. Some time after dark on the night of July 14, 1956, James Nelson and a white accomplice entered the mill and set it afire, using hay and gasoline previously placed there" (App. p. A-42).

The trial judge, however, left out of his opinion the crucial point in Nelson's tale. On his discovery deposition

and in all prior statements which defendants' counsel had taken from him, he said that he and the white man broke some bales of hay and scattered it around in the room in the mill and then poured milk cans of gasoline over the hay, then sat around for about 15 minutes and started the conveyor by means of the electric switch and ignited the gasoline by striking matches. After the mill was afire, they came out through the door by which they had entered. On the discovery deposition Nelson said that they saw that the hay was caught good before they left, that they were right at the door, not as far as eight or ten feet from it (Tr. First Trial, Vol. ..., page ...).

If the Pulaski Mill & Elevator Company fire on July 14, 1956 had been set by James Nelson and Arthur Watts by striking matches to gasoline and hay spread out like the insurance companies had Nelson telling it, there would have been an explosion that would have blown the town of Pulaski into Kingdom Come. Furthermore, the Deputy Fire Marshal and the special investigator for National Board of Fire Underwriters when they arrived on the scene would have found the charred corpses of James Nelson and Arthur Watts inside the very room where the gasoline was poured around and where it was claimed struck the matches (after sitting around for fifteen minutes giving it ample time to fill the entire room with gasoline vapor) looking like the remains of the bodies of those Buddhist priests over in South Vietnam who chose suicide by gasoline and matches, with monotonous success.

The defendants' expert on combustion, Dr. F. A. Griffitts, upon cross-examination by plaintiff-appellant's counsel, testified:

> "Q. Liquid gasoline does not burn? It is the fumes or vapors from the gasoline which burns, isn't it, Doctor?
>
> A. Properly mixed with air.

Q. Gasoline itself will not ignite?

A. Right.

Q. And if you poured on the floor in a building here, one of these buildings here, on a hot summer night, milk cans of gasoline in one room; say, two, three, four, five, six or seven milk cans of gasoline in one room, you first spread hay around and some hay on the elevator belt; and then you got milk cans of gasoline and saturated the hay; and poured it all around the room; and then you stood in there and took a match and struck it, what would happen?

A. The man who struck the match would probably be pretty badly singed. Without any doubt. Just what would happen would be pretty hard for me to say. It would be pretty hard for anybody to say exactly what would happen unless they were there and saw it. If anybody——

Q. He would be singed because he would be in the fumes which were ignited by the striking of the match?

A. Probably so.

Mr. Farmer: That is all" **(Tr. pp. 799-800).**

But it was not claimed that Nelson was singed. Nor was any evidence introduced by these resourceful insurance companies to show that Watts was singed.

Deputy State Fire Marshal Gray Ragsdale, witness for the defendants, testified on cross-examination:

"Q. Have you had any experience in your investigation of investigating gasoline fires?

A. Yes, sir.

Q. What happens when you spread out gasoline on the floor and strike a match?

A. It explodes.

Mr. Farmer: Explodes. That is all" **(Tr. p. 656).**

Harry Avery, special investigator for National Board of Fire Underwriters, who was called by the defendants, testified that in his first comprehensive report on this fire, he reported that the fire started with a large amount of smoke and small light or flame:

"By Mr. Farmer:

Q. If you didn't say this. On Saturday night somewhere about nine o'clock, July 14, an unidentified woman who was driving down the Lawrenceburg highway stopped at a neighbor's home across the highway and advised that this property was on fire. A large amount of smoke and small light or flame could be observed at the time the fire was discovered. That is in your report, original report, isn't it?

A. Yes, sir.

Q. You have heard of a lot of fires caused by the use of gasoline in starting them?

A. Yes, sir. I have called on a lot of people who set fires, set themselves on fire; got badly burned themselves to death.

Q. Yes, sir, but you wouldn't want to pour out gasoline, large quantities of gasoline in a closed building on a hot summer night; milk cans of gasoline; and stand in the building and turn on a switch; put on hay in the first place; spread hay around and put gasoline all over the hay; and then turn on a switch and start a conveyor and then light a match to it and try to get out of that building alive?

A. I wouldn't want to pour out the gasoline anywhere myself."

Tr. pp. 721, 724.

The story about Nelson and a white accomplice setting the building on fire the way the insurance companies tried to prove is simply an affront to common sense and reason. Everybody who has ridden in a commercial

airlines airplane knows that the reason for the "No Smoking" sign is to prevent fumes from gasoline being ignited. Everyone who has seen a gasoline truck with big letters "INFLAMMABLE" or "FLAMMABLE" knows that gasoline is a volatile liquid and the fumes from it are ignited by fire from matches, electric switches, static electricity, etc., and the result is explosions and very dangerous fires. That is just about everybody in this country. Every child old enough to go to school knows better than to pour out gasoline and strike matches where the fumes are. Realizing the predicament the defendant insurance companies had found themselves in, Mr. Henry of the defendants' counsel endeavored to get them "off the hook" with the jury. In his argument he said:

> "We have the hay that had been placed in this crusher, and Ladies and Gentlemen, don't be deceived about this idiotic argument that they took those milk cans and poured the gasoline right down in the floor, and stood there and struck a match. Of course that didn't happen and no one ever suggested that happened."
>
> **Tr. p. 1624.**

Then Mr. Henry proceeded to outline a brand new theory about how the fire was started with gasoline and hay. He told the jury:

> "The gasoline had to go around, it had to be put in a number of different places. The proof shows this building right here, I believe, is 200 feet long. I believe that is what the proof shows, I know it shows that, and it shows there is a back door right back here, we proved that by Mr. Gray Ragsdale.
>
> "There is a conveyor belt there, and I—most of you gentlemen, at least, have been in mills, and know the speed with which conveyor belts move.

I submit to you that lighted hay on a conveyor belt wouldn't travel as fast 200 feet as a man could walk away from it. He could have gotten anywhere he wanted to by the time that hay got down there, the lighted hay got down to the place where the gasoline was."

Tr. p. 1624.

Unfortunately for the defendants, the record did not bear out his contention. Only the "idiotic" theory was attempted to be proven by them.

Judge Miller, the trial judge on the second trial, in passing on plaintiff-appellant's motion for a directed verdict on the issue of felonious burning, admitted that the story the insurance companies obtained from Nelson about him and the white man striking matches to gasoline vapors inside the closed room in the building and then walking out unsinged—like Shadrach, Meshach and Abednego, the three Hebrew children who walked in the fiery furnace (Dan. 1:3)—was incredible. The admission is implicit in his statements in the following colloquy:

"The Court: **Because it's unbelievable in that aspect,** I should exclude the whole thing?

Mr. Farmer: That's the heart of it. That's the way he said he did it, and if the way he said he did it is so incredible that no one can believe it, no court is bound by incredible evidence.

The Court: He could be mistaken on that. He stepped outside the door, could have, and thrown a match inside and run away. I don't know. That's a matter for the jury." (Emphasis added.)

Tr. on Second Trial, Vol. 3, pp. 430-1.

There was no evidence that Nelson stepped outside and threw a match inside and ran away—the way Judge Miller suggested it could have been done.

The first jury found for the plaintiff after hearing both Nelson the lawyer who took the original statement about setting fire to hay and gasoline on his wire recorder.

Judge Gray, the first trial judge, said that the jury was capricious to believe Nelson's testimony on the witness stand that he did not set fire to the mill. And now, the Court of Appeals has said that it has reviewed the evidence and approves Judge Gray's finding that plaintiff-appellant's counsel was guilty of unprofessional conduct in interviewing Nelson after his discovery deposition has been taken and taking a sworn statement from him repudiating the whole thing!

The opinion of this Court, along with Judge Gray's published opinion, puts a stigma on the good name and reputation of plaintiff-appellant's counsel which will remain in the law books to be read by future generations forever. If the opinions had set out the critical part of Nelson's tale which he repudiated and had also disclosed that defendants' counsel termed this part of the story as "idiotic", the opinion would be unsound on its face. But, the essence of the Nelson story is suppressed.

The finding of prejudicial misconduct of counsel, in the circumstances of this case, was not an independent ground for setting aside the verdict of the jury. The whole object of the judicial inquiry was the ascertainment of the truth. Both the circumstances of the taking of the statement by Nelson of setting fire to the mill obtained by defendant's counsel and the repudiation of that statement obtained by plaintiff-appellant's counsel were properly shown for the consideration of the jury, and to be weighed by the trial court in passing on a motion for a new trial asserting that the verdict of the jury is against the **overwhelming** weight of the evidence. And, it needs be borne in mind that neither juries nor judges are bound by testimony that they do not believe. **Quock Tig v. U. S., 140 U. S. 417, 11 S. Ct. 733, 851 (dissenting opinion), 35 L. ed.**

501; Atlantic Works v. Brady, 107 U. S. 192, 2 S. Ct. 225, 27 L. ed. 438.

Petitioner submits that what the Court of Appeals has done in the case now before this Court is as much an infraction of the Seventh Amendment as what was done in the leading case of **Slocum v. New York Life Insurance Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. ed. 879.** In **Slocum,** the jury returned a general verdict for the plaintiff. The Circuit Court of Appeals, on an examination of the evidence, concluded that it was not sufficient to sustain the verdict, and on that ground directed a verdict for the defendant. The Court, in its opinion, said:

> "In other words, the Circuit Court of Appeals directed a verdict for one party when the verdict was for the other, and did this on the theory, not that the judgment was required by the state of the pleadings, but that it was warranted by the evidence. It will be perceived, therefore, that the court, although practically setting the verdict aside, did not order a new trial, but assumed to pass finally upon the issues of fact presented by the pleadings and to direct a judgment accordingly.
>
> . . . . . .
>
> "In the present case certain well-defined issues of fact were presented by the pleadings, which the plaintiff, as also the defendant, was entitled by the Constitution to have tried to the court and a jury. Such trial was had and resulted in a general verdict resolving all the issues in plaintiff's favor. That verdict operated to prevent a re-examination of the issues save on a new trial granted by the trial court in the exercise of its discretion, or ordered by the appellate court for error of law."

In the case at bar a trial was had and resulted in a verdict for the plaintiff on the two issues of arson and fraud and false swearing. That verdict operated to pre-

vent a re-examination of the issues save by a new trial granted by the trial court in the proper exercise of its discretion. In granting the new trial, the trial judge went right into the teeth of the rule declared by this Court in **Tennant v. Peoria.** The action of the trial court was upheld by this court by application of the rule that there was no showing as a clear abuse of discretion since there was substantial evidence which would have sustained a verdict by the jury contrary to the one it rendered. What the Court of Appeals overlooked was that **Tennant v. Peoria** deprives the trial court of the power to reweigh the evidence and set aside the jury verdict merely because the trial judge thinks other results are more reasonable. In light of this rule, the trial judge in granting the new trial exercised a power he did not possess—certainly not after **Tennant v. Peoria.** This is true as to **both** issues of arson and fraud and false swearing, because his lengthy and detailed memorandum shows that he did **exactly** what this Court had held that he had no power to do. An act by a judge which he is not empowered to do is certainly an abuse of discretion. And, clearly it was beyond the power of the courts below to making the finding that plaintiff and her counsel wrongfully procured Nelson to change his testimony. The verdict of the jury on the first trial necessarily imports the finding that they **rightfully** did that, for they brought out the **truth.** No one will now gainsay that. And yet, by a curious and unprecedented line of reasoning the Court of Appeals has reached the result of denying petitioner the jury verdict which resulted from a fair trial!

REASONS RELIED ON FOR GRANTING THE WRIT.

If the Court when it laid down the rule in **Tennant v. Peoria meant** that it should be respected and applied by the lower courts certiorari ought to be granted in this

case. Hardly any bar association convention or law school commencement is held when there is not some speech lauding the jury system as the bulwark of our liberties. If we are not simply to render lip service to the Seventh Amendment, it is now for this Court to say so—in this case.

The law ought to be applied equally in favor of the weak and the strong, the poor and the rich. It would, perhaps, be trite and impertinent to urge such a consideration before this Court except for the fact that the respondents in the case at bar happen to represent a massive combination of wealth and power and influence. Some of the seven defendants are members of a group which is rated as one of the largest and strongest multiple line insurance operations in the world. If that fact was irrelevant to the result attained in the courts below by so strained and tortuous a process of judicial action and decision, why did the Court of Appeals for the Sixth Circuit not accord the jury verdict a mere modicum of the respect paid the verdict in the case of **Cutter v. Cincinnati Union Terminal Co.**, 361 F. 2d 637 (1966)? In that case the court was unwilling to overturn a jury verdict although, in the language of the court of appeals' opinion,

> "From our review of the record we unhesitatingly observe that a jury could easily have concluded that plaintiff's testimony as to the circumstances of his claimed accident, and the relation of his present disabilities to the happening of such an accident was pure fabrication."

It is an extraordinary coincidence that the three judges of the court of appeals composing the panel in the Cutter case all have sat in the case at bar.

And finally, as is said almost daily by very high-placed and esteemed citizens in this election year, our nation is going through a period of moral decline. Our judicial system has not been spared from the nation's self-reproach.

By taking jurisdiction to remedy a gross miscarriage of justice in the case at bar, the Court will be setting an example of what is needed to accomplish a moral regeneration in our sick society.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari issue from this Honorable Court and that the judgment of the Court of Appeals be reversed and it be directed that the verdict of the jury on the first trial and the judgment of the District Court thereon be reinstated.

Respectfully submitted,

FYKE FARMER,
511 American Trust Building,
Nashville, Tennessee 37201,
Attorney for Petitioner.

APPENDIX

APPENDIX A.

OPINION OF COURT OF APPEALS.

(397 F. 2d 889.)

(Filed July 18, 1968, Carl W. Reuss, Clerk.)

Nos. 17871 and 17872

United States Court of Appeals
For the Sixth Circuit

No. 17,871
Helen Corrine Scales Trice, Executrix Under the Will of Joe W. Scales, Deceased,
Plaintiff-Appellant,

v.

Commercial Union Assurance Company, Ltd., et al.,
Defendants-Appellees.

No. 17,872
Commercial Union Assurance Company, Ltd., et al.,
Cross-Plaintiffs-Appellants,

v.

Helen Corrine Scales Trice, Executrix Under the Will of Joe W. Scales, Deceased,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Tennessee, Columbia Division.

Decided July 18, 1968.

Before: Weick, Chief Judge, McCree, Circuit Judge, and McAllister, Senior Circuit Judge.

Weick, Chief Judge. This case is before us a second time.[1] The prior proceedings in this action as well as the facts of the case are adequately detailed in the published opinions of the District Court and this Court, and will not be repeated except where necessary for clarity.

Upon remand to the District Court following our decision on the first appeal, plaintiff's action on fire insurance policies was retried before another jury which was unable to agree on the issue of arson but did find in favor of the insurers on the issue of fraud, false swearing and wilful misrepresentation in the proof of loss, and returned a verdict in favor of the defendants and assessed a statutory penalty against Scales' executrix in the amount of $5,000 for bad faith in bringing the suit.

The District Court decided in favor of Scales' executrix on the insurers' counterclaim based on subrogation and assignment, growing out of the insurers' payment of the mortgage indebtedness under the standard mortgage clauses in the policies. It was the view of the Court that upon payment by the insurers, the mortgage indebtedness was discharged and hence Scales' estate was not liable to pay interest.

The present appeals were taken by the executrix and the insurers to review the judgment of the District Court.

The executrix contends that we erred in our decision on the first appeal in holding that the District Judge did not abuse his discretion when he granted the motion for a new trial on the ground that the verdict of the jury was manifestly against the great weight of the evidence. The District Judge had also based his ruling on prejudicial misconduct of counsel. The executrix asks us to overturn our decision on the appeal and reinstate the original verdict

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[1] Our decision in the first appeal is reported in 334 F. 2d 673 (1964), *cert. denied*, 380 U. S. 915 (1965). We affirmed in part and reversed in part, 213 F. Supp. 675 (M. D. Tenn. 1963).

and judgment in her favor and thus render nugatory the proceedings and judgment of the District Court upon remand. We find no merit in this contention.

This type of relief is available only under extraordinary conditions which do not exist in the present case. Our opinion in the first appeal constitutes the law of the case. *General American Life Ins. Co.* v. *Anderson,* 156 F. 2d 615 (6th Cir. 1946). See also *Wharton* v. *Hirsch,* 348 F. 2d 906 (2nd Cir. 1965); *Green* v. *Baltimore & Ohio R. R. Co.,* 337 F. 2d 673 (6th Cir. 1964); *Henderson* v. *United States,* 218 F. 2d 14 (6th Cir.), *cert. denied,* 349 U. S. 920 (1955).

The evidence on which the District Judge relied in granting the motion for a new trial is outlined in his comprehensive opinion, 213 F. Supp. 675, and it is not necessary for us to detail it here. There is nothing in the record which would warrant a change in our opinion, and we adhere to it.

The executrix argues that the District Court erred in denying her motion for a directed verdict on the issue of arson. In considering such a motion the District Court was required to view the evidence, as well as the inferences properly deducible therefrom, in the light most favorable to the defendants. *Minton* v. *Southern Ry. Co.,* 368 F. 2d 719, 720 (6th Cir. 1966).

We have reviewed the evidence in this case which is substantially portrayed in the published opinions of the District Court and of this Court. We are of the opinion that it would have been error for the District Court to have directed a verdict in favor of either party to this lawsuit. The disputed facts in this case, including the inferences, required submission of the issue of arson to the jury.

In our judgment, there was substantial evidence to support the verdict of the jury in favor of the defendants on the issue of fraud, false swearing and wilful misrepre-

sentation in the proof of loss. This defense was based on a provision contained in all of the insurance policies avoiding liability where such practices are resorted to. The provision seems to be a common one in insurance contracts. The Tennessee courts have long recognized that an insured's recovery on an insurance contract may be barred by a violation of the provision. See e. g. *Columbia Horse & Mule Comm'n Co.* v. *American Ins. Co.*, 173 F. 2d 773 (6th Cir. 1949); *Renner* v. *Firemen's Ins. Co.*, 136 F. Supp. 114 (E. D. Tenn. 1955); *Dosset* v. *First Nat'l Fire Ins. Co.*, 138 Tenn. 551, 198 S. W. 889 (1917); *Boston Marine Ins. Co.* v. *Scales*, 101 Tenn. 628, 49 S. W. 743 (1899).

We do not agree with appellant that the District Court in its charge to the jury allowed the jury to reach its verdict by a "process of pyramiding of inferences." The Court did charge the jury:

> "The knowledge or lack of knowledge, as well as the intention or lack of intention, on the part of Scales can only be inferred from all of the relevant circumstances in the case. Now this presents questions of fact for your determination."

This instruction was taken from our opinion in the first appeal, *id.*, 676. Under Tennessee law, "A fact may be inferred from circumstantial evidence and such fact may be the basis of a further inference to the ultimate or sought for fact." *Stinson* v. *Daniel*, ... Tenn. ..., 414 S. W. 2d 7 (1967).

There was no error in the admission into evidence of a contemporaneous fraud practiced by Scales on an insurer of grain alleged to be stored in the bins covered by defendants' insurance policies on the building. This evidence was admitted for consideration by the jury in determining knowledge of intent. *Summers* v. *Howland*, 61 Tenn. 407, 409 (1873). The Court was careful to point out to the jury the only purpose for which this evidence could be considered.

The penalty assessed by the jury was within the permissible limits of the statute. T. C. A. 56-1106.

The remaining question in the case relates to the liability of Scales' estate on the subrogation claim of the insurance companies.

Scales purchased the mill from L. E. Hewgley Seed Company, Inc., subject to mortgage indebtedness thereon in the amount of $40,000. In the deed to Scales it was specifically provided that he did not assume or agree to pay the mortgages and was merely purchasing the equity of the grantor in the property.

Shortly after purchasing the property an extension agreement was entered into between Scales, the mortgagees and the principal debtor, Hewgley, whereby the mortgagees agreed to extend the time of payment of the mortgage debt for an additional five-year period payable $8,000 per year with the first payment due October 22, 1956, and final payment due October 22, 1960, in consideration for which Scales agreed to pay the first installment of $8,000 due October 22, 1956, and monthly interest on the remaining indebtedness of $32,000. In the event the payments were not made when due, the mortgagees had the option to declare the entire balance due.

Following the death of Scales in May, 1959, the mortgagee bank enforced its banker's lien against Scales bank account and collected $13,143, representing the $8,000 principal payment for which he was obligated and interest on the entire debt to that date. At the time suit was instituted on the insurance policies in the District Court the total amount of the mortgage debt was figured at $48,000, representing $32,000 plus interest, plus $10,000 attorneys' fees. Settlement of their claims under the standard mortgage clauses was made by the mortgagees with the insurance companies, by which settlement the mortgagees received $32,962.50, leaving a balance unpaid on the mort-

gage debt of $16,000. The notes and mortgages were assigned to the insurance companies. The mortgagees agreed to and did bid $16,000 for the mill property at foreclosure sale, and acquired the property for that amount. In this manner the mortgagees received full payment of their mortgages and, in addition, $10,000 charged by their attorney which became part of the mortgage indebtedness.

The insurers claim that Scales' estate is liable for the payment of interest on $32,000 from May, 1959 to the present date. Their theory is that, under the provisions of the standard mortgage clause in the policies, the insurers were liable to the mortgagees for the fire damage even though they had a defense under the policies of insurance against the owner of the property and, upon payment of their liability and assignment to them of the notes and mortgages, they were subrogated to the rights of the mortgagees against the owner.

The District Judge was of the opinion that the settlement agreement between the mortgagees and the insurance companies, followed by the payment of $32,962.50 and the liquidation of the mortgage security, operated to extinguish the mortgage indebtedness and to release not only the principal debtor, Hewgley, but also Scales who had agreed to pay interest only on the principal obligation. We are of the opinion that Scales' estate is not liable, but for a different reason.

Hewgley was the principal debtor. The insurance companies asserted no defense against him. Scales assumed no part of the principal debt except $8,000 which was paid out of his bank account. Scales was liable only for the payment of interest.

The insurance companies assert that the only way Scales could relieve himself from liability for interest is to pay the principal obligation of Hewgley amounting to $32,000, for which he was not liable. Under this contention Scales

would be liable for the payment of interest indefinitely if Hewgley did not pay the debt for which he alone was liable. But Scales never agreed to pay the principal debt. Yet under the insurers' contention he would be compelled to pay the principal to relieve himself of liability for the interest.

In our opinion the settlement agreement is not clear and unambiguous. It does not state how long Scales was to pay interest. It can be interpreted to mean that Scales was to pay interest until Hewgley paid the principal, as the insurers claim. However, a more reasonable interpretation, and the one which we are inclined to adopt, is that Scales agreed to pay interest during the five-year period the mortgage debt was extended.

Where an agreement is susceptible of two different interpretations, of which one is reasonable and the other is unreasonable, the reasonable one will be adopted. *Turner* v. *Zager,* 50 Tenn. App. 674, 363 S. W. 2d 512 (1962); *E. O. Bailey & Co.* v. *Union Planters Title Guar. Co.,* 33 Tenn. App. 439, 232 S. W. 2d 309 (1949). Under this interpretation no interest could be collected after October 22, 1960.

Affirmed.

APPENDIX B.

JUDGMENT OF COURT OF APPEALS.

United States Court of Appeals
For the Sixth Circuit.

(Filed Jul. 18, 1968, Carl W. Reuss, Clerk.)

No. 17,871.

Helen Corrine Scales Trice, Executrix Under the Will of Joe W. Scales,

Plaintiff-Appellant,

vs.

Commercial Union Assurance Company, Ltd., American National Fire Insurance Company, North British & Mercantile Insurance Company, Citizens Insurance Company of New Jersey, Queen Insurance Company of America, Home Insurance Company, and New Hampshire Fire Insurance Company,

Defendants-Appellees.

Before: Weick, Chief Judge, McCree, Circuit Judge, and McAllister, Senior Circuit Judge.

Judgment.

Appeal from the United States District Court for the Middle District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said

District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

A True Copy.

Attest:

.....
Carl W. Reuss, Clerk.

Issued as Mandate:

Costs:

Filing fee.....$

Printing $

Total $

APPENDIX C.

OPINION OF COURT OF APPEALS ON FIRST APPEAL.

(334 F. 2d 673 (1964))

Helen Corinne Scales Trice, Executrix,
Plaintiff-Appellant,

v.

Commercial Union Assurance Company, Ltd., et al.,
Defendants-Appellees.

Nos. 15,285-86 and 15,345.

United States Court of Appeals, Sixth Circuit.

July 14, 1964.

Rehearing Denied Sept. 1, 1964.

• • • • • • • •

Fyke Farmer, Nashville, Tenn., for appellant.

William B. Cain, Columbia, Tenn., Lon P. MacFarland, Columbia, Tenn., Joe W. Henry, Jr., D. C. Lee, Pulaski, Tenn., Malcolm Marshall, Louisville, Ky., on the brief, for appellees.

Before O'Sullivan, Circuit Judge, and Boyd and Wilson, District Judges.

Frank W. Wilson, District Judge.

These three consolidated appeals involve a single lawsuit brought to collect fire insurance upon a feed mill known as the Pulaski Mill & Elevator Company. The mill was damaged by fire upon July 14, 1956. Joe W. Scales, the original plaintiff, was the owner of the Pulaski Mill &

Elevator Company property and was the named insured upon policies issued by the seven insurance companies who are defendants herein.[1] The subject insurance policies provided a total coverage of $25,000.00 upon the building and an additional coverage of $25,000.00 upon the machinery and equipment.

At the time of the fire loss, Thurman Smith and the Union Bank of Pulaski, Tennessee, were the holders of an indebtedness approximating $40,000.00, which was secured by a trust deed upon the mill property, machinery and equipment. These lien-holders joined as original co-plaintiffs in the suit, asserting rights under the standard mortgage clauses in the subject policies. In addition to the seven insurance company defendants involved in this appeal, the original suit by the plaintiff, Joe W. Scales, joined two other insurance carriers, seeking recovery for the loss of grain alleged to have been stored in the mill at the time of the fire. The plaintiff, Joe W. Scales, died during the pendency of the suit, and the suit was revived in the name of his executrix, Helen Corinne Scales Trice, who is the appellant herein.

Among other matters asserted in defense of the suit, the defendants below contended that Scales had been guilty of procuring the burning of the said mill and had been guilty of fraud, false swearing and wilful misrepresentation in submitting a proof of loss on the fire in which it is contended he misrepresented the size of the grain storage bins and the quantity of grain lost in the fire. Each side sought to recover of the other a statutory penalty for the other having allegedly exercised bad faith in the bringing

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[1] The seven defendants who are appellees here are Commercial Union Assurance Company, Ltd., American National Fire Insurance Company, North British & Mercantile Insurance Company, Ltd., New Hampshire Fire Insurance Company, Citizens Insurance Company of New Jersey, Queen Insurance Company of America, and The Home Insurance Company. The case was tried and submitted jointly as to these seven defendants.

of the suit or in the defending of the suit (56-1105 and 56-1106, T. C. A.). The case was tried before a jury. Shortly before completion of the trial and submission of the case to the jury, a settlement was effected between the mortgagee plaintiffs and the seven defendants, in which settlement a total of $32,962.50 was paid to the mortgagees under the building coverage and machine coverage policies, representing a payment on principal of $25,000.00 and a payment on interest of $7,962.50. A judgment of dismissal was thereafter entered as to the mortgagees' lawsuit. The plaintiff, Helen Corinne Scales Trice, was not in any way a party to the settlement between the defendants and the mortgage holders, and the trial of her case was continued with the case being submitted to the jury upon special issues. The jury found that Scales had practiced fraud in the proof of loss submitted with reference to the grain and contents policies, but had not procured the burning of the feed mill property and had not been guilty of fraud with reference to the building policies or the machinery and equipment policies. The jury further found that Scales had acted in bad faith in bringing the lawsuit against the two defendants upon the grain and contents policies, and awarded these defendants a judgment of $3,000.00. The jury further found that the plaintiff was entitled to recover of the remaining seven defendants the sum of $25,000.00, the policy limits, upon the building policies and $20,000.00 upon the machinery and equipment policies, wherein the policy limits totalled $25,000.00. The claim of the plaintiff for a statutory penalty by reason of bad faith refusal of the defendants to pay the plaintiff's insurance claims was denied by the jury.

The above jury verdict was returned upon May 18, 1962, and upon May 25, 1962, the clerk entered a judgment thereon, awarding a judgment in favor of the plaintiff, Mrs. Trice, and against the seven defendants who were the

building and equipment insurance carriers in the sum of $25,000.00 for damages to the insured building and for $20,000.00 for damages to the insured machinery and equipment, and awarding a judgment in favor of the two defendants who were grain insurance carriers and against the plaintiff, Mrs. Trice, in the sum of $3,000.00.

As noted above, a judgment of dismissal was entered as to the claims of the mortgagee plaintiffs upon an agreed settlement, this judgment of dismissal being entered under date of May 28, 1962. The plaintiff, Mrs. Trice, so the record reflects, has paid the $3,000.00 judgment in favor of the two grain insurance carriers, so that this suit remains pending only as between the plaintiff, Mrs. Trice, and the seven defendants who have the building and equipment coverage.

The issues raised upon these three appeals involve not only matters that transpired at the trial of the case prior to the entry of the judgment upon May 25, 1962, but also matters that arose in subsequent proceedings before the trial court. It is therefore necessary to recount the events in the record subsequent to the entry of the judgment upon May 25, 1962.

Upon May 28, 1962, a motion for judgment notwithstanding the verdict or in the alternate for a new trial was filed upon behalf of the seven defendants involved in this appeal. Upon June 4, 1962, a motion was filed by the plaintiff seeking to have the judgment amended to include interest from the date the suit was filed. Upon July 23, 1962, the Court entered an order amending the judgment of May 25, 1962, so as to allow the plaintiff interest from the date of the filing of the suit, but also allowed the defendants credit for payments made to the mortgagees to the extent the mortgage lien was reduced thereby. Within ten days after the order of July 23, 1962, the defendants renewed their motion for judgment notwithstanding the

verdict and for new trial. Each party also filed motions with respect to the order of July 23, 1962, and upon October 8, 1962, the Court overruled the plaintiff's motion to vacate that portion of the order crediting the defendants with the sums paid the mortgagees and overruled the defendants' motions to disallow interest on the judgment, but expressly reserved any action upon the defendants' motions for judgment notwithstanding the verdict or new trial. The plaintiff then on November 7, 1962, filed notice of appeal from those portions of the order of July 23, 1962, and October 8, 1962, allowing the defendants credit for payments made to the mortgagees. This notice of appeal constitutes the basis of the appeal in Docket No. 15285.

Upon December 20, 1962, the Court entered a further order setting aside the jury verdict upon the grounds that the evidence was undisputed that Scales did practice fraud, false swearing and misrepresentation as against the defendants herein, who were insurors of the buildings and equipment, and upon the further grounds that the verdict was against the weight of the evidence insofar as it found that Scales did not burn his feed mill or cause it to be burned and insofar as it found that Scales did not practice fraud, false swearing and misrepresentation as against the defendants herein. The defendants' motions for a judgment notwithstanding the verdict and for new trial were each thereupon sustained. Action was reserved, however, upon the assessment of damages upon the defendants' counter-claims. A notice of appeal was filed by the plaintiff on January 19, 1963, from the order of December 20, 1962. This notice of appeal constitutes the basis of the appeal in Docket No. 15,286.

Upon January 25, 1963, the Court entered a further order disposing of all pending matters, including an affidavit of bias filed by the plaintiff and including the counter-claim based upon alleged bad faith bringing of

the suit by the plaintiff. The Court allowed the defendants a judgment of $6,250.00 against the plaintiff upon this counter-claim. A third notice of appeal, which constitutes the appeal in Docket No. 15,345, was thereupon filed by the plaintiff, appealing from the order of January 25, 1963. The opinion of the Court upon which the foregoing orders were entered appears under the style of Smith v. Insurance Co. of North America, D. C., 213 F. Supp. 675.

[1] It is apparent from the foregoing statement of the record that the appeals taken November 7, 1962, and January 19, 1963, in Dockets Nos. 15,285 and 15,286 respectively, were prematurely taken in that the orders from which they were taken were not final judgments subject to appeal under 28 U. S. C., § 1291. The alternate motions for judgment notwithstanding the verdict or for new trial filed May 28, 1962, remained pending at the time the notice of appeal was filed in both Dockets Nos. 15,285 and 15,286 and the motions were not finally disposed of until the order of the Court entered January 25, 1963. These appeals should therefore be dismissed. The filing and pendency of these untimely appeals did not divest the Trial Court of jurisdiction to proceed to a final judgment. United States v. Crescent Amusement Co., 323 U. S. 173, 65 S. Ct. 254, 89 L. Ed. 160 (1944); Healy v. Pennsylvania R. Co., 181 F. 2d 934, cert. den. 340 U. S. 935, 71 S. Ct. 490, 95 L. Ed. 674 (C. C. A. 3, 1950); Resnik v. LaPaz Guest Ranch, 289 F. 2d 814 (C. C. A. 9, 1961). Furthermore, all issues raised by the appeals in Dockets Nos. 15,285 and 15,286 are likewise asserted in Docket No. 15,345, which appeal the Court will now proceed to consider.

The appellant (the plaintiff below) contends that the Trial Court was in error (a) in granting the judgment notwithstanding the verdict, (b) in granting the motion for new trial, (c) in awarding damages against the plain-

tiff for a statutory bad faith penalty without submitting this issue to the jury, and after such claim was barred by the statute of limitations applicable to claims against estates, and (d) in ruling upon the defendants' motion for judgment notwithstanding the verdict on new trial after the filing of an affidavit of bias by the plaintiff.

In granting the defendants' motion for judgment notwithstanding the verdict, the Trial Court concluded that the evidence was undisputed that Joe W. Scales, the insured, in his sworn proof of loss had overstated the size of the grain bins and the amount of grain claimed to have been lost in the fire. The Trial Court further concluded that Scales had made these false representations "knowing either that they were not true or that he did not know they were true," and was thus guilty of fraud, false swearing and willful misrepresentation as a matter of law, thereby entitling the defendants to a judgment notwithstanding the verdict.

[2-4] A review of the record in this case reveals that it is undisputed in the record that an error or misstatement was made in the proof of loss with respect to the dimensions of certain of the grain storage bins. The proof of loss stated that certain bins involved in the fire had overall dimensions of 20′ x 52′ x 30′, when in fact the bins measured 16′ x 30′ x 17.5′. To constitute false swearing and willful misrepresentation so as to bar the plaintiff's recovery as a matter of law, however, it must appear undisputed that misstatements in the proof of loss were knowingly made with the intent to deceive or defraud the insuror. The knowledge or lack of knowledge as well as the intention or lack of intention upon the part of Scales can only be inferred from all of the circumstances under the record in this case. Scales had died prior to the trial. His statement, taken by the defendants prior to the institution of the lawsuit, was introduced at the trial by stipulation. However, only portions of it ap-

pear to have ever been read to the jury. No awareness upon the part of Scales of any error, much less any admission of willful misrepresentation, is made in this statement. In our opinion the issue of the knowledge or intention of Scales was a disputed issue of fact which required submission of that issue to the jury. The intent with which a false representation is made and the existence of fraud is ordinarily a question of fact to be decided by the jury in view of all of the circumstances. Rooks v. American Brass Co., 263 F. 2d 166 (C. C. A. 6, 1959); Arkansas Fuel Oil Co. v. Magrath Oil Co., 131 F. 2d 318 (C. C. A. 6, 1942); Simon v. Goodyear Metallic Rubber Shoe Co., 105 F. 573 (C. C. A. 6, 1900); 24 Am. Jur., Fraud and Deceit, Sec. 295. The Trial Court was therefore in error in granting the judgment notwithstanding the verdict upon the issue of fraud, false swearing and willful misrepresentation.

[5] Upon the defendants' alternate motion for new trial, the Trial Court concluded that the verdict of the jury was against the great weight of the evidence both upon the issue of fraud and upon the issue of arson and therefore granted the defendants' motion for a new trial. The action of the Trial Court in ruling upon the motion for new trial after having sustained the judgment notwithstanding the verdict was in accordance with the rule in the case of Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 61 S. Ct. 189, 85 L. Ed. 147 (1940). The plaintiff contends that the Trial Court was in error in granting the motion for new trial.

[6, 7] The granting of a new trial upon the ground that the verdict is contrary to the weight of the evidence is a matter resting in the sound discretion of the Trial Judge and his action thereon is not reviewable upon appeal except upon a showing of a clear abuse of discretion. As was stated by this Court in the case of Turner v. United States, 229 F. 2d 944 (C. C. A. 6, 1956), at page 945:

"The controlling question is whether the order of the District Court granting a new trial constituted a clear abuse of discretion (Citations omitted). It was held in the Spero-Nelson case (Spero-Nelson v. Brown, 6 Cir., 175 F. 2d 86), that where the jury's verdict resolves a factual question the trial court's action in overruling such motion cannot be reviewed by the Court of Appeals unless it involves an abuse of discretion. The granting or refusing of a new trial is a matter resting in the sound discretion of the trial judge and his action thereon is not reviewable upon appeal save the most exceptional circumstances. Aetna Casualty & Surety Co. v. Yeatts, 4 Cir., 122 F. 2d 350, 352-354. We therefore are concerned only as to whether the District Court clearly abused its discretion in granting the new trial. Cf. Hill v. Pennsylvania Greyhound Lines, Inc., 3 Cir., 174 F. 2d 171, 172. An appellate court reviewing an order granting a new trial will consider all intendments in favor of the order made by the trial judge. The order will not be reversed if the record discloses any tenable ground in support of the order (Citation omitted)".

A review of the record in this case reveals that there was no abuse of discretion by the Trial Court in granting the defendants' motion for a new trial. There was substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing in the proof of loss and that he had participated in procuring of the burning of the subject property.

Having concluded that the judgment notwithstanding the verdict should be set aside but that the Trial Court did not abuse its discretion in granting a new trial, it is not necessary to consider other issues raised in this appeal. The action of the Trial Court in granting the judgment notwithstanding the verdict will be reversed but the order granting a new trial will be affirmed and the case remanded accordingly.

APPENDIX D.

MEMORANDUM OF TRIAL JUDGE ON FIRST TRIAL.

(Reported as Smith v. Insurance Co. of North America, 213 F. Supp. 675 (1963)).

Gray, District Judge.

The overriding issue on the trial of this case was whether the late Joe W. Scales had somebody set fire to his feed and seed mill near Pulaski, Tennessee, July 14, 1956, to collect insurance. The overwhelming weight of the evidence was that he did. The jury said he did not but did say that he had been guilty of fraud, false swearing or willful concealment or misrepresentation of material matters in relation to his claims against the two defendants who insured only grain and other commodities stored in the mill.

Upon the verdict, judgment was entered in favor of the substituted plaintiff, Helen Corinne Scales Trice, Executrix of Scales's will, for $45,000.00 against the seven defendants insuring buildings, machinery and equipment, and a judgment was entered against Mrs. Trice and in favor of the two grain insurers both on her claim against them and on their counterclaim for the statutory bad faith penalty, T.C.A. § 56-1106, the amount of the judgment against her being $3,000.00. Mrs. Trice has paid this judgment.

By the satisfied judgment, the defendants, Insurance Company of North America and United States Fidelity & Guaranty Company, have been eliminated from the case. By compromise, settlement and agreed order of dismissal the mortgagee-plaintiffs, Thurman Smith and Union Bank of Pulaski, Tennessee, had been eliminated before the

case was submitted to the jury. Thus the issues now before the court are entirely between Mrs. Trice and the seven remaining defendants, Commercial Union Assurance Company, Limited; American National Fire Insurance Company; North British and Mercantile Insurance Company, Limited; Citizens Insurance Company of New Jersey; Queen Insurance Company of America; Home Insurance Company and New Hampshire Fire Insurance Company. Unless otherwise designated, references to the plaintiff and the defendants hereafter refer to these remaining parties only.

The issues now to be decided were raised by the defendants' timely motions under Rule 50(b), Federal Rules of Civil Procedure, for judgment notwithstanding the verdict and for new trial; by the plaintiff's motion under Rule 60(b) (4), Federal Rules of Civil Procedure, for relief from a portion of the amended judgment entered on the special verdict; and by the plaintiff's notice of appeal from a prior order of the court. Because the issues raised by the plaintiff's actions are jurisdictional, they will be considered first.

I.

The Plaintiff's Motion for Relief and Notice of Appeal.

Pursuant to the plaintiff's own motion to amend the original judgment of May 25, 1962, the court asked counsel to submit a proposed order. It received two conflicting proposals and the parties submitted briefs on the merits of the proposals. Upon consideration of the briefs the court entered an order July 23, 1962, directing entry of an amended judgment allocating the costs, granting the plaintiff's request for interest on the damages found by the jury, and granting the defendants' proposal that the judgment specifically provide for credit against t' judg-

ment for payments made to the mortgagee-plaintiffs under the compromise settlement. Each side then entered a new motion to amend the judgment to eliminate the prior amendment favorable to the opposing party, and the defendants, out of an abundance of caution, also renewed their motions under Rule 50(b). The opposing motions to amend the amended judgment were denied in an order entered October 8, 1962, in which the continuing pendency of the motions under Rule 50(b) was noted. The plaintiff's instant motion for relief was filed thirty days later, on November 7, 1962, and the notice of appeal was filed one minute after the motion. The asserted object of both is to delete from the amended judgment the provision that the defendants should receive credit against the judgment for payments made to the mortgagees under the loss-payable clauses of the policies on which this action is founded. The ground is that the court lacked jurisdiction to amend the judgment in the absence of a timely motion by the defendants.

[1, 2] Neither a motion for relief under Rule 60(b) nor an appeal under 28 U. S. C. § 1291 will lie except to a final judgment. The original judgment involved here has never become final because it was suspended upon the filing of the defendants' timely motions under Rule 50(b) and will remain suspended until these motions are disposed of, Rules 62(f) and 73(a), Federal Rules of Civil Procedure; Waller v. Skeleton, 31 Tenn. App. 103, 212 S. W. 2d 690 (M. S. 1948); Phinney v. Houston Oil Field Material Co., 252 F. 2d 357 (5th Cir., 1958). The intervening proceedings and orders directed to the form and incidental provisions of the suspended judgment on the suspended verdict are necessarily interlocutory until such time as the judgment amended could come into force.

[3] The plaintiff contends, however, that the entry of the amended judgment impliedly overruled all motions

inconsistent with it then pending, citing Mosier v. Federal Reserve Bank of New York, 132 F. 2d 710, 712 (2nd Cir., 1942); Agostino v. Ellamar Packing Co., Inc., 191 F. 2d 576, 577, 13 Alaska 34 (9th Cir., 1951); 42 C. J., Motions & Orders, § 148, p. 511; 60 C. J. S., Motions & Orders, § 38, p. 37 at notes 36-38. The origin of this was in Corpus Juris based on state court cases; Mosier cited C. J.; and Agostino and C. J. S. cited Mosier. The authority may be taken as supporting the rule, but not the application urged by the plaintiff. By its terms and as applied in the cases the rule contemplates that the judgment or order from which the implication arises be inconsistent with granting the motion. In fact, the Mosier case involved a situation in which the judge had specifically overruled the motion in question but had entered no formal order to that effect prior to entry of a final judgment. In the present case, no judgment has become final to the present day. Motions filed by the plaintiff herself were sufficient to keep it from becoming final until October 8, 1962, and the order entered that date specifically noted the continuing pendency of the defendants' motions. Furthermore, the order of July 23, 1962, specifically ordered entry of the amended judgment as of the date of the original one. And even if that order might otherwise have been a final one, the defendants' renewal of their motions challenging the verdict would have been effective to suspend it. Clearly there has been no implication by the court or any indication of any inference by the parties that the defendants' motions were overruled. In a brief filed September 17, 1962, the plaintiff said:

> "The defendants, within ten days after the reception of the verdict, filed the motion for judgment in accordance with their motions for a directed verdict, and in the alternative for a new trial. Thus, they have followed the procedure entitling them to have both motions passed on by the Court."

[4, 5] In any view, there was no appealable order or judgment on which the plaintiff could base her notice of appeal of November 7, 1962. It is true that ordinarily even an appeal that is later dismissed will divest the District Court of jurisdiction during the pendency of the appeal. Commonwealth Ins. Co. of New York v. O. Henry Tent & Awning Co., 273 F. 2d 163, 165 (7th Cir., 1959). But the court is not required to suspend its proceedings while the plaintiff pursues an improvident appeal, Resnik v. La Paz Guest Ranch, 289 F. 2d 814, 818 (9th Cir., 1961), particularly where it is apparent that it is a nullity, see United States v. Crescent Amusement Co., 323 U. S. 173, 177-178, 65 S. Ct. 254, 89 L. Ed. 160 (1944). The motion is likewise untimely and must be dismissed.

Even if the motion were properly before the court on its merits, it would have to be denied for several reasons:

[6] 1. The plaintiff herself opened the judgment for amendment, treated the defendants' proposals as properly before the court on their merits and briefed them repeatedly prior to the July and October orders without once suggesting that they were untimely. She cannot be heard to raise this technicality now unless she is prepared to show that the court lacked jurisdiction to amend the judgment in any respect, yet she is obviously not prepared to abandon the portions of the amendment favorable to her.

[7] 2. The provision to which the plaintiff objects was so obviously implicit in the original judgment that its omission may properly be regarded as an inadvertent error subject to correction at any time under Rule 60(a), Federal Rules of Civil Procedure.

3. The challenged provision is in accord with her testator's original complaint, which she necessarily adopted in reviving the case and which she has never sought to amend.

4. Her bald effort to require the defendants to pay double on a single liability shocks the conscience of the court.

In short, her motion is without any vestige either of legal merit or of good faith.

II.

Defendants' Motion for Judgment N. O. V.

The defendants moved for directed verdicts on all issues at the close of all the evidence on grounds that the evidence conclusively established the affirmative defenses of fraud, false swearing, willful concealment and misrepresentation of material matters, and arson, and that it conclusively established both the good faith of the defendants in refusing to pay the claims and the bad faith of Scales in bringing suit. They further moved for a directed verdict on the plaintiff's claim under the machinery and equipment coverage of the policies on the ground that there was no competent proof of value as to these items within the definitions of the policies. They now seek judgment in accordance with the motion for a directed verdict.

A. *Fraud, False Swearing and Willful Misrepresentation.*

The uncontradicted evidence, admissions and stipulations show the following facts pertinent to the issue of fraud, false swearing and willful misrepresentation:

1. Scales and Lewis E. Hewgley filed a single joint proof of loss with the General Adjustment Bureau, agent of all eleven of the companies who had fire insurance policies in force on the mill and its contents at the time of the fire, including the nine original defendants in this case.

2. Upon objection by the companies that the proof of loss was not sworn to as required by the policies, both men subsequently filed a joint amendment verifying the entire proof of loss under oath. Scales further verified it on oath under oral examination.

3. This document listed the estimated building loss at $44,200.02, machinery and equipment losses exceeding $5[illegible],000.00, and losses on grain and other contents of $32,601.90. The first two figures were applicable entirely to Scales's policies while the figure on the grain and other commodities was divided into $7,101.99 applicable to Hewgley's policy, which is not involved in the present litigation, and $25,499.91 applicable to Scales's policies.

4. The building damage figure included $7,280.00 for wooden grain bins alleged in two places in the proof of loss to have had overall dimensions of 20 feet by 52 feet by 30 feet, which would have had a capacity of 24,960 bushels.

5. The wooden grain bins referred to above actually measured 16 feet wide, 30 feet long, and 17.5 feet high, had a capacity of 6,720 bushels level full and would have cost no more than $3,600.00 to replace with new materials.

6. The proof of loss listed grain and other commodities, including grain presumably stored in the wooden bins mentioned above, variously by bushels and by tons. The total of the bushels was 17,953; the total of the other items listed by weight was more than 57 tons.

7. Only a fraction of the commodities claimed were or could have been in the mill.[1]

[8] There is some evidence in the record that Hewgley may have been the primary source of some of the figures

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[1] This statement gives full weight to testimony of the plaintiff's witness, Frank O. Fitts, in attempted rebuttal of the defendants' grain oxidation expert, Dr. F. A. Griffitts, although Fitts was never properly qualified as an expert.

used in the proof of loss, but if that is true it is clear that he provided them as Scales's agent insofar as they related to Scales's claims. Scales ratified them under oath twice after he was or should have been aware that the claims were being challenged. Scales was no innocent pawn like the wives who were exonerated of false swearing on proofs of loss prepared by their husbands in Boston Marine Insurance Co. v. Scales, 17 Pick. (101 Tenn.), 628, 49 S. W. 743 (1899). In the present case Scales was a businessman of wide experience, including long familiarity with fire insurance. It may not be assumed that he did not know the importance of his oath to the insurance companies, or that he didn't know there was no appreciable amount of grain in his mill, or that the wooden grain bins were less than a third the size he represented them to be. He actively joined Hewgley in describing the grain bins. He swore that the facts in the proof of loss were true knowing either that they were not true or that he did not know they were true. In either case he knowingly swore falsely in matters he knew were material, and he knew that if the insurance companies relied on his word, as they were entitled to do, he would receive thousands of dollars to which he was not entitled. This was an attempted fraud in violation of the implied covenants of all contracts. See 2 Gibson's Suits in Chancery (5th Ed. Crownover) § 978. In the present case, however, it is not necessary to consider the consequences of the violation of implied covenants because each of the insurance contracts contains a specific clause that provides as follows:

> "This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto."

Although contracts with eleven insurance companies were originally involved in the claim and nine of them in this lawsuit, the principles are the same as if there were only two—one insuring grain and contents and one insuring buildings, machinery and equipment. The separate policies on grain and contents are no longer directly involved. The seven policies now before the court are all alike, covering buildings, machinery and equipment with a joint maximum coverage of $25,000.00 on the building items and $25,000.00 on the machinery and equipment items. For simplicity, reference hereafter will be to the grain policies as a unit and to the mill property policies as a unit. The two pertinent coverages of the mill property policies will be referred to as the building coverage and the machinery coverage.

In simplest terms, then, the problems are these:

1. Did the attempted grain fraud bar recovery under the mill property policies?

2. If not, did the overstatement of the bin size bar recovery under the building coverage of the mill policies?

3. If so, did it also bar recovery under the machinery coverage?

The plaintiff urges that the first question should be answered in the negative, and cites Epperson v. Westchester Fire Ins. Co., 155 Tenn. 621, 299 S. W. 776 (1927), as controlling authority on the point. In that case the Tennessee Supreme Court held that a daughter who had joined her father in submitting a false proof of loss under one policy would not be prevented from collecting on another separate policy of her own with a different company on different goods in the same building as to which she had submitted an honest claim. The brief opinion in that case indicates strongly that the court did not consider the daughter actually guilty of intentional wrong.

In addition, the court said, 155 Tenn. at 622, 299 S. W. at 776:

> "From the opinion of the Court of Appeals and examination of the record it does not appear that this petitioner 'swore falsely to any paper which was filed with her company' (Court of Appeals Op., p. 5), or was guilty of making to the representatives of her company any material misrepresentations as to her claim."

The same cannot be said of Scales in the present case. His sworn proof of loss was a single instrument submitted to the agency representing all of the insurance companies. The document received by every one of the companies was the same document, and that document was so steeped in fraud as to render everything in it unfit for presentation in a court of law. The portions of the document where lies were deemed unnecessary can no more be isolated and sanitized than partially fraudulent consideration can render a deed or contract only partially voidable. The Supreme Court of Tennessee made the point with old-fashioned metaphor a century and a quarter ago in Floyd v. Goodwin, 8 Yerg., (16 Tenn.) 484, 490-491 (1835):

> "But should the whole consideration, or only a part thereof be merely a nominal or a colorable consideration, hatched and contrived to hinder, delay and defraud creditors from the recovery of their just and honest debts out of these negroes, the whole contrivance would be void and of no effect. * * * The law feels the wound, when its process is bruised and bleeding under any fraudulent contrivance; and will punish any one who will attempt to contaminate her channels of justice by fraud."

But the joint nature of the proof of loss—Scales's own action in bundling his lies in the same package with the truth—is not the only factor linking all these claims to-

gether. The fire was single, the risk was single, and the coverage, though apportioned, was not separated. If Scales had elected to proceed against each insurer separately so as to isolate the lies as far as he could, the matter of the grain loss would still have been a vital consideration to all insurers. Here was where a margin of profit might be found to show a motive for arson. Here was the item that could be moved easily and stealthily before a fire. This was the item as to which the insurers were most dependent on the honesty and accuracy of records kept by the insured. Certainly these insurers of buildings and machinery would not have suffered the allegations to remain separated even if Scales had attempted to separate them. The whole proof of loss must be considered a statement under oath to every one of the defendants, and all of it was material to every one of the claims.

[9] The answer to the first question is that the grain fraud attempt rendered the whole contrivance void, and no recovery ought to be allowed against any company victimized by this fraudulent proof of loss from this single fire.

[10] But let it be supposed that the answer were otherwise for purposes of considering the other two questions. So far as it affects the building coverage of the mill policies, the overstatement of the size of the wooden grain bins was not apparently designed to increase the amount of recovery. An honest contractor estimated the damage to other building items at figures totaling well above the maximum coverage of the policies, and the indications are that additional building items might have been listed truthfully. But the narrow margin by which the plaintiff managed to top the building coverage maximum when it came down to proof on this trial[2] is sufficient to indicate

[2] The contractor's figure for replacement of the oversized wooden grain bins was excluded on objection to the hearsay dimensions,

the fallacy of this argument. Assume, however, in the plaintiff's favor, that Scales had no intention to defraud the property insurers in overstating the size of his grain bins. Let it be supposed that he only intended to buttress and cover up his fraud upon the grain insurers. But (to paraphrase from Claflin v. Commonwealth Ins. Co. of Boston, Mass., 110 U. S. 81, 3 S. Ct. 507, 516, 28 L. Ed. 76 (1884)), what is that, but that he was induced to make statements, known to be false, intended to deceive the present defendants, lest they might discover, and others through them, the falsity of his claims against their co-defendants who insured only grain? And the Supreme Court's conclusion in Claflin would need only a change of factual details to apply with even greater force in the present case:

> "* * * and it is no palliation of the fraud that Murphy did not mean thereby to prejudice them, but merely to promote his own personal interest in a matter not involved in the contract with them. By that contract the companies were entitled to know from him all the circumstances of his purchase of the property insured, including the amount of the price paid and in what manner payment was made; and false statements, wilfully made under oath, intended to conceal the truth on these points, constituted an attempted fraud by false swearing which was a breach of the conditions of the policy, and constituted a bar to the recovery of the insurance."

In the present case the false statements were more closely related than those in Claflin, and the false state-

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and he disclosed that his figures for steel tanks were mere guesses. Thus, on direct examination he established a total of no more than $22,233.62 for the cost of replacing damaged buildings with *new* materials. This figure was raised to $25,833.62 when he supplied on cross-examination an estimate for the bin based on the correct dimensions given him by defense counsel.

ment to the building insurers here was more directly material to a proper determination of the claims against them than the one to the insurer in Claflin.[3]

Furthermore, the companies and the court were and are entitled to look to the established attempt at fraud on the grain claims to give color and meaning to the vast overstatement of the grain bin dimensions. As the Supreme Court of Tennessee said in a different context in Summers v. Howland, 2 Baxt. (61 Tenn.) 407 (1873):

> "We do not say the fact that one conveyance, made at the same time, as others, to different parties, is or might be shown to be fraudulent, would be conclusive upon the others, but the fact might in connection with other circumstances, furnish the ground for weighty inferences tending in that direction, and should be looked to in arriving at a conclusion in such a case."

[11] Therefore, the second question, too, must be answered against the plaintiff, leaving for determination the third question whether this defense is also good as to the claims under the machinery coverage. This may be briefly answered by reference to a Tennessee case in direct point. Insurance Co. v. Connelly, 20 Pick. (104 Tenn.) 93, 56 S. W. 828 (1900). There the court held that the false swearing as to personally barred recovery as to both personalty and realty, although the coverage limits of the policy were separately stated as they are here. Furthermore, the court held that the result would have obtained even if the two coverages were deemed severable for other purposes, 20 Pick. at 97, 56 S. W. at 829. And it is at least doubtful if that court would hold the realty and

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[3] There are indications in this record that the present case might have been even more directly analogous to Claflin than this comparison would indicate in view of the hazy nature of the evidence of the consideration for Hewgley's transfer of title to Scales, but this has not been developed for consideration here.

personalty coverages of the present policies severable. See Payne v. Eureka-Security Fire & Marine Ins. Co., 173 Tenn. 659, 122 S. W. 2d 431 (1938), affirmed on rehearing, 175 Tenn. 134, 133 S. W. 2d 456 (1939).

The Connelly case, of course, was not an action at law but a suit in equity to enjoin an action at law. But there is no indication that the Tennessee courts apply the technical distinction between fraud in equity and fraud at law except in evaluating doubtful evidence or in adjusting the remedy where there are equities on both sides. See 1 Gibson's Suits in Chancery (5th ed. Crownover), § 456, n. 73, p. 521.

Under the uncontradicted evidence, the defendants' motion for a directed verdict should have been granted as to the plaintiff's claims against them on the grounds of attempted fraud, false swearing, and willful misrepresentation in the proofs of loss and oral proceedings subsequent to the fire. It follows necessarily that they were also entitled on the same grounds to a directed verdict on the issues of their own good faith and the bad faith of Scales. It follows further that the defendants are entitled to have the verdict as to these issues set aside and judgment entered in their favor in accordance with the verdict that should have been directed. The question whether the amount of damages recoverable on the counterclaim for the bad faith penalty provided by T. C. A. § 56-1106 should have been or should hereafter be submitted to a jury will be reserved until the hearing that must in any event be held on the other issues raised by the counterclaims that were not submitted to the jury.

B. *Arson.*

[12] The evidence on the issue of arson was conflicting. Therefore, no directed verdict could have been granted on that ground.

C. *The Good Faith Issues.*

The defendants' good faith was conclusively established by the plaintiff's own evidence in chief, and the court probably should have removed this issue from the case at the close of the plaintiffs' evidence. See Niagara Fire Ins. Co. v. Bryan & Hewgley, Inc., 195 F. 2d 154 (6th Cir., 1952). Be that as it may, the jury found for the defendants on this issue, and to this extent the jury's verdict is approved.

[13] Considered aside from the evidence on the issues of arson, fraud, false swearing and willful misrepresentation, there is nothing on which to predicate a finding that Scales brought the lawsuit in bad faith. It is only in conjunction with a finding of arson, fraud, false swearing or willful misrepresentation that a judgment for the statutory bad faith penalty, T. C. A. § 56-1106, could be supported against him.

III.

The Motion for New Trial.

In the event the ruling on the motion for judgment notwithstanding the verdict should be set aside in any subsequent proceedings, then the rulings set out hereafter on the issues raised by the motion for new trial will apply. Montgomery Ward & Co. v. Duncan, 311 U. S. 243, . . . S. Ct. 189, 85 L. Ed. 147 (1940).

A. *Admissibility and Sufficiency of the Plaintiff's Evidence in Chief.*

The defendants now challenge the entire testimony of all of the plaintiff's witnesses in chief on the question of damages on grounds that it was irrelevant and incompetent for that purpose.

No such objection was preserved on the trial as to the testimony of Ernest Prosser, the contractor on whose estimates the building loss claim was based, and even if an exception had been preserved it would now be moot. Defense counsel conceded in open court that the agreement with the mortgagees removed this issue from the case.

[14] The defendant's objections were properly made and renewed at every opportunity as to the testimony on the value of machinery and equipment. It is true that the evidence of the destruction and value of machinery and equipment fell short of proving all the items claimed in the proof of loss and failed to establish directly the value as defined in the policies, but it was not incompetent or inadequate to support the verdict. Each of the witnesses was fully qualified to give the testimony he gave, and the jury was fully informed of the limitations and weaknesses of that testimony. The jury would not have been justified in accepting the figures given by the witnesses as figures meeting the definitions of value set out in the policies. As it happened, it did not so accept them. The lowest total submitted—by a witness presumably friendly to the defendants—was $42,000.00. The coverage limit of the policies in this category was $25,000.00. The jury awarded damages in this category of only $20,000.00.

The standard urged by the defendants would be too strict for many honest fire victims to meet and would set a premium on manufactured evidence. The correct principle is set out in 31 C. J. S., Evidence, § 181, p. 882, as follows:

> "Value, whether intrinsic or as regulated by the 'market,' is a quality so subtle and intangible, is a function of so many variables and these, frequently, of such a trivial nature, where intrinsic, it is so

> largely a matter of individual estimate or opinion, and when judged by the market its standards so largely consist of the opinion not under oath of a large and usually indefinite number of persons as indicated by trade lists, prices current, and other publications more or less official, that a relaxation of strict rules of evidence is necessary and use must be made of such probative methods as are available. Value or market price may be shown by either direct or circumstantial evidence."

The challenged testimony was not direct evidence of value as defined in the policies, but it was circumstantial evidence from which the jury could arrive at a reasonable estimate of the value, as defined, of the machinery and equipment actually shown to have been destroyed.

The special objection to the testimony on recall of Roy B. Arney, Mrs. Trice's brother-in-law, was more soundly based. The transcript discloses that Arney was allowed to remain in the courtroom in violation of the rule of exclusion after the plaintiff's counsel had indicated an intention to recall him and after repeated warnings to counsel to keep witnesses out of the courtroom. However, this question has become moot along with objections to Prosser's testimony for the reasons already mentioned.

B. *Admissibility of the Testimony of L. E. Hewgley, Plaintiff's Rebuttal Witness, and of the Defendants' Proffered Impeachment Evidence.*

Hewgley, one of the original owners who built the mill and the sole owner, through a corporation, at the time he sold it to Scales in the fall of 1955, was presented by the plaintiff as a rebuttal witness. The defendants objected that part of his testimony was not proper rebuttal and that part going to the question of value was excluded. The present assignment applies only to testimony of value, and it is therefore not well founded,

[15] The defendants further insist upon their exception, properly preserved for review, to the court's refusal to allow them to introduce a decree of another court to discredit Hewgley. This decree, handed down by the Chancery Court of Giles County, Tennessee, in the related case of L. E. Hewgley Seed Co. v. Travelers Insurance Co., amounts to a judicial determination that Hewgley was a liar. It was obvious that the defendants needed something to assist in breaking the smooth front he presented in the face of their cross-examination. But the court cannot be faulted for excluding this decree, which was highly prejudicial on the merits of this case, even if it had discretion to admit it, when the defendants failed to make use of a more satisfactory means of impeachment available in this very record. There was already in evidence, in the proof of loss to which Hewgley had subscribed under oath, a resounding lie already shown and conceded to have been false yet Hewgley was not asked a single question about it.

Furthermore, the defendants have cited no authority in support of their contention that the decree was admissible. Such authority as the court has had called to its attention is persuasive that it would have been error for the court to have admitted it. See 98 C. J. S., Witnesses, § 470, p. 348, text at note 31.

There was no error of which the defendants may now take advantage in the reception of Hewgley's testimony or is the rejection of the decree proffered by the defendants.

C. *Instructions to the Jury.*

[16] The defendants' exceptions to the court's refusal to give the jury three requested instructions will be passed over lightly. The charge of the court as given fully and correctly covered the points of law included in

the three requests. It was not error to refuse to repeat them. The other objections to the instructions are more serious.

[17] The defendants allege the court erred in giving the jury the plaintiff's requested instruction No. 4. The instruction was not given exactly as requested, but was given in this amended form:

> "Evidence that a witness has, on prior occasions, made contradictory statements is received only for the purpose of impeaching his credibility as a witness, and is not to be considered as establishing the truth of a prior contradictory statement."

Admittedly this rule of law is subject to severe criticism. A prior contradictory statement would have no reasonable tendency to impeach testimony if it did not also have a tendency to establish the truth of the matters asserted in it. The only basis for objection is the hearsay rule, and none of the dangers of hearsay are present here. See 3 Wigmore, Evidence, § 1018. Such reason as the rule may contain would be much better applied by the jury in the same way it is expected to resolve other conflicts in testimony. Nevertheless, the rule as given represents the present law in Tennessee, King v. State, 187 Tenn. 431, 215 S. W. 2d 813 (1948), and the court cannot say that including it in its charge on request was an error requiring a new trial.

The defendants made timely objection to the court's action in submitting Special Interrogatory No. 2 to the jury separating the fraud, false swearing and willful misrepresentation issue into four categories—(a) grain policies, (b) building coverage, (c) equipment coverage, and (d) other matters. It does not appear that this division was misleading. The failure of the jury to find fraud in relation to the building coverage because of the overstatement

of the size of the grain bins was more likely a misinterpretation of the evidence. The failure of the court to direct a verdict as to all defendants based upon the jury's finding of fraud in relation to the grain policies was not attributable to a defect in the form. It was merely a repetition of the same error of law that led the court not to grant the motion for a directed verdict at the close of the evidence. Nor was there any necessary prejudice to the defendants in obtaining a more detailed report of the jury's findings on this question.

The defendants further allege that the court should not have submitted the question of value of building items to the jury because the defendants had already settled this issue by agreement with the mortgagee-plaintiffs. The contention is sound, but it is difficult to see how the defendants were or could have been prejudiced by the court's oversight in submitting the issue after indicating its intention not to do so.

There was no error in the instructions to the jury calling for a new trial.

D. *Weight and Sufficiency of the Evidence*

[18] By every combination of words known to the form books, the defendants challenge the sufficiency of all the evidence to support the verdict. There can be no doubt that the court has the duty of weighing the evidence on such a motion, although the standard to be applied is not Tennessee's "13th juror" rule. Werthan Bag Corp. v. Agnew, 202 F. 2d 119 (6th Cir., 1953). The proper test in the federal trial courts of this circuit was given in the Agnew case this way:

> "In Felton v. Spiro, supra [[6 Cir.] 78 F. 576, 581], Chief Justice Taft, then a member of this court, wrote an instructive opinion upon the subject matter

making it clear that it is the duty of the trial judge 'to consider whether the verdict was against the great weight of the evidence' * * *."

In the present case, the evidence was such that the result would be the same under either the Tennessee or Sixth Circuit rule for weighing the evidence after verdict. Considered apart from the evidence relating to arson and fraud, the verdict finds ample support in the record. Technical defects in the proof of loss, if any, were effectively waived, all the evidence indicating that the defendants considered the proof to have been properly submitted as of the date the sworn amendment to it was filed. The amount of the loss was not conclusively established but it was well supported by the evidence. The policies were in full force at the time of the fire. If it were not for the evidence of arson and fraud the court would be content to approve the verdict either as 13th juror or otherwise.

The arson and fraud issues are another matter. As set out in Part II, supra, evidence establishing fraud, false swearing and willful misrepresentation of a nature vitiating all of the policies sued on in this action stands uncontradicted. Even if the court's action in granting judgment notwithstanding the verdict on this isuse should be set aside, justice would still require a new trial on the issue.

[19] There was enough conflicting evidence on the arson issue to preclude a directed verdict on that ground, but the evidence tending to establish arson was so ponderous and so slightly rebutted that the jury's verdict cannot be allowed to stand. With all the presumptions in favor of the verdict of a jury and with full allowance for the jury's prerogatives in judging the credibility of witnesses, the preponderance still lies heavily in the defendants' favor.

If this case had been tried by the court on the evidence presented to the jury, the findings of fact pertinent to the arson issue would have been these:

1. Joe W. Scales, at the time of the fire that brought on this lawsuit, already had a record of eleven previous insured fire losses in plants in which he had an interest as mortgagee, owner or otherwise, involving insurance payments in excess of half a million dollars over a period of thirty years.

2. Scales obtained title to this mill in a transaction with Lewis E. Hewgley for a consideration that was the subject of rather evasive testimony by both Scales and Hewgley. The transaction occurred after Hewgley had operated the mill at a loss for several years, and Scales promptly reduced the operation to little more than a warehouse plus a private feed-grinding facility serving the cattle farms of himself and close associates. The plant was a special-purpose plant that could not easily be converted to other uses. The consideration as disclosed, with the outstanding mortgage indebtedness, implied a valuation of no more than $70,000.00 or $80,000.00 for the mill and the valuable industrial tract with long rail and highway frontages and it may well have been much less. The outstanding insurance on the buildings and equipment totaled $56,000.00. The valuations of the machinery, without considering any discount for transportation to a market, plus the replacement cost of the buildings exceeded this amount. The situation was clearly one in which arson could have been profitable.

3. About two months before the fire, Scales paid an extra premium for permission of his grain insurers to move certain grain from a building that was not burned to one that was burned.

4. During the two or three weeks before the fire, big trucks entered the plant empty and hauled away goods in

sacks steadily enough to attract the notice of neighbors.

5. Several days before the fire, R. C. Jones learned from Scales that the plant was going to burn.

6. A few days before the fire, a certain Grain Vayor, valued in the proof of loss at $3,948.00, was moved up near the portion of the plant that burned from a corner of the property where it had stood unused for a year or more.

7. During the last two or three days before the fire, employees at the plant crushed a great deal of hay and stacked it around the machinery. This was an unusual time of year for such an operation in the area.

8. The day before the fire Jones and Audie Allen hauled milk cans from Jones' farm and Scales' farm to the mill at Scales' request, and these were used as containers for gasoline in preparation for the fire.

9. On the morning of Saturday, July 14, 1956, Scales promised James Nelson $50.00 if he would assist in setting the fire and arranged for R. C. Jones to pick Nelson up in Pulaski and deliver him later to a rendezvous with another accomplice for the purpose, and Jones did so.

10. Late in the afternoon of July 14, 1956, Lewis E. Hewgley visited C. B. McKnight, who lived and operated an old car sales lot immediately across the road from the mill.

11. In the late afternoon and night of July 14, 1956, before the fire, Mr. and Mrs. C. B. McKnight were expecting the mill to burn that night and were under instructions from somebody not to call the fire department.

12. On the night of July 14, 1956, before the fire, Mr. and Mrs. R. C. Jones were watching the sky in the direction of Scales's mill in anticipation of a big fire.

13. Some time after dark on the night of July 14, 1956, James Nelson and a white accomplice entered the mill and set it afire, using hay and gasoline previously placed there.

14. Scales was attending a movie at a nearby drive-in theater when the fire broke out, was notified of the fire by the manager, and went immediately to Pulaski to post the $50.00 guarantee required by the city fire department before making fire runs beyond the city limits.

15. Firemen arrived at the plant expecting to find a source of water in an old basement they had used for that purpose previously and found the basement had been filled in.

16. When Fire Inspector Thomas R. Williamson asked Scales about sending for the department's third and last truck to make up enough hose to reach the nearest hydrant, Scales said, "Let the damned thing burn. It is insured."

17. The big, wooden compartmented grain bin collapsed in the fire in less than two hours and observers could see that there was little or no grain in it.

18. Some time after the fire Scales asked Williamson, "What is your price?" under circumstances clearly meaning the price of his silence about facts pertinent to Scales's fire loss.

19. On Monday and Tuesday after the fire, July 16 and 17, there was a quantity of grain, probably mostly oats, smoldering in or beneath the seven 750-bushel steel grain tanks west of the big wooden bin, there was a seven-foot circle of smoldering grain and similar debris about knee deep on the floor of one of the ruined buildings, there were about 750 bushels of corn smoldering in a 5,000-gallon steel tank attached to a quonset-type building north of the wooden bin, and there was about a pickup-truck load of smoldering grain or similar com-

modities within the foundations of the destroyed wooden grain bin. There was no other evidence of grain or other commodities damaged by the fire, and no grain was spilled out in the area around the wooden bin.

20. Although there appears to have been no contention that any records were destroyed in the fire, Scales did not produce adequate records of grain inventory for the company auditor until some weeks after the fire.

21. Scales and Hewgley described the destroyed wooden bin for an investigating agent of the defendant companies shortly after the fire.

22. After the fire, Scales obtained the services of Ernest Prosser, a contractor, to estimate the cost of rebuilding the damaged portions of the buildings. Scales, Hewgley and an adjuster for the defendants went over the plant with him. In estimating the wooden grain bin he used dimensions supplied by Hewgley in Scales's presence, but he indicated his dissatisfaction with the basis both in his estimate and on the witness stand.

23. The dimensions represented to Prosser were 20 feet by 52 feet by 30 feet. He indicated he took this to mean 20 feet wide by 52 feet long by 30 feet high. The correct dimensions were 16 feet wide by 30 feet long by 17½ high.

24. On September 6, 1956, Mrs. Helen Corinne Scales Trice, Scales's daughter, who was closely associated in his business activities, delivered to the General Adjustment Bureau, agent for all the defendants, a document designated as a proof of loss under all the policies involved in this lawsuit and two others. This document was signed by Scales so far as the claim was against the defendants in the present case and by Hewgley so far as the claim was against a company whose grain policy is not involved here. The document was not sworn to as required by the policies, and after objection

on this score Hewgley and Scales filed an amendment verifying the entire document under oath. The companies treated this document as having been filed as of the date of the verification and it will be referred to as a proof of loss hereafter without qualification.

25. The proof of loss claimed the policy limits on all policies applicable to the buildings that were burned and their contents. In two places the dimensions of the wooden grain bin were listed as 20 feet by 52 feet by 30 feet without specifying which of the dimensions was width, which length or which height. The grain claim purported to be based upon a continuing inventory with credit for salvage. In the recapitulation the destroyed or damaged grain was listed in amounts totaling 17,960 bushels, and other commodities measured only by weight in amounts totaling about 57 tons. Credit was given for 121,610 pounds of salvaged grain. No salvage was listed for the other 57 tons of commodities, some of which would not burn, and no other acccunting for it has since been made so far as this record shows. The claim for grain listed 644,512 pounds of shelled corn alone, which should have left a residue of 386,000 pounds even if every grain of it had been subjected to 2,000 degrees of temperature with plenty of oxygen for the two hours the wooden grain bin stood before collapsing, which is a laboratory ideal not likely to have been reproduced.

26. In the latter part of January, 1957, Scales was questioned under oath by counsel for the defendants in accordance with their rights as reserved under the policies. He again vouched under oath for every item in the proof of loss, although stating that he relied upon books kept by Buford Hill for the grain figures. He refused to answer questions, on advice of his attorney, concerning his previous fire record. [The transcript of his evasive testimony was introduced in full by stipulation, but the record does not disclose that the jury

read or heard any parts other than those mentioned, and the other parts are not here considered.]

27. Those in a position to testify directly as to the acts of arson and procurement of arson kept their secrets well until Scales died in April, 1959. Arthur Watts was questioned in 1957 as a suspect, but he denied any knowledge of it, and nothing further developed at that time. During the year after Scales died, however, some of these witnesses became involved in litigation with Mrs. Trice, his executrix, on various claims by and against the estate. Whether these actions destroyed the good will that had protected Scales in his lifetime or whether it was a coincidence, it was less than a year before rumors became more definite and led to a new investigation that produced a great deal of the conflicting portions of the evidence in this case.

The above findings are based entirely upon evidence presented to the jury without any request for limiting instructions. Furthermore, the findings reflect very cautious treatment of hearsay evidence even where introduced without objection, and serious conflicts were resolved in the plaintiff's favor unless the preponderance was clearly the other way. However, the findings also reflect the court's judgment on the credibility of witnesses to some extent. The question then arises how these findings must be altered to give due allowance to the jury's prerogative for judging which testimony to believe and which to disbelieve.

The jury could not have been so capricious as to believe Nelson's testimony on the stand, and it was precluded from accepting the reading of his prior deposition during his examination as substantive proof. Nelson's testimony, therefore, must be disregarded for present purposes. This does not mean, however, that the uncontradicted evidence of his prior confessions and denials

must be disregarded. His oath obviously gives no guaranty of veracity either way, and his mental capacity and difficulty of expressing himself accurately even when he apparently desired to tell the truth throws doubt on many details of his statements. Yet the circumstances under which his various out-of-court statements were made provide strong evidence from which to draw inferences as to the probability that he set the fire at Scales's request. Each of his numerous confessions, considered separately, was made under circumstances tending to indicate their truth, at least to the extent that he had guilty knowledge of the origin of the fire. His two out-of-court repudiations of his confessions were made under circumstances tending at least to throw doubt upon the validity of the repudiation.

Certainly Nelson's accusation that D. C. Lee, one of the defendants' attorneys, obtained the first wire-recorded confession by trickery was absolutely refuted. In a statement given to Mrs. Trice and her counsel under questionable circumstances, Nelson described the recording session this way:

> "In a few minutes he came back with some kind of a machine in a case. He opened it up and after he had punched some buttons around and had got it fixed, he started asking me questions. He started telling me what he wanted me to say and would ask me to repeat it. When I did he would turn the machine on. Then he would go to something else and have me repeat that and when I did he would turn the machine on to take it down. Mr. Lee made up the whole story * * *."

This is clearly a complete fabrication. First, the time Lee was shown to have been with Nelson in private was only fifteen or twenty minutes, during which he set up his machine and recorded about ten minutes of questions and answers. Assuming perfect stage management and

no mistakes in timing this could not have been done in that time with the aid of an expert sound engineer using professional equipment if any appreciable number of questions or answers had to be repeated. It is absurd to suggest that a lawyer using a crotchety old hand-me-down wire recorder could stage-manage, interrogate and manipulate the recorder as charged successfully even in a matter of hours.

Second, it was shown that the recorder used could not be turned off and on without producing an audible, peculiar popping noise at the point of shutoff. No such noise can be heard on the tape except at the point the machine was cut off while Lee went to get Thomas Dunlap to witness the third interrogation. It is apparent that Lee did not even take the chance of turning the machine off between the first and second times he had James tell his story. Such additional pops as could be heard were obviously microphone or room noises that largely occurred at points where the recorder could not have been stopped without cutting a word short.

Third, Lee's and Nelson's voices too often overlap to have been managed as charged.

Fourth, Nelson obviously was of too slow a mentality to have learned his story so well in fifteen or twenty minutes of confusing intermittent instruction and recording to have been able to repeat it with variations immediately afterward with an additional witness, and to have withstood vigorous cross-examination by skilled and experienced attorneys two weeks later.

Finally, Nelson himself repudiated the accusation the day after he made it in a private, voluntary statement to Jones Boyd and subsequently to others. He re-adopted the accusation in internally conflicting and patently perjured testimony on this trial.

Considered together, all of Nelson's actions and statements prior to the trial are almost conclusive on reasonable minds that Nelson took part in setting fire to the mill, and it needs only slight corroboration to be utterly convincing that Scales hired him to do it. Such corroboration is abundant, not only in those portions of R. C. Jones's story that are additionally corroborated by Mrs. Jones, but by the massive uncontradicted circumstantial evidence against Scales. Jones, of course, was seriously discredited by the nature of his own testimony, and by his admitted hostility to Mrs. Trice, and by the obviously good reasons he had for that hostility. Nevertheless, the implication of his testimony in the context of this case is that such lying as he may have been doing was designed to minimize his admission of complicity in arson rather than to assume a criminal accomplice's role which he did not play, and that his hostility to Mrs. Trice brought out partial truth, not fabrication.

In rebuttal, the plaintiff offered an impressive array of undependable witnesses:

Lewis E. Hewgley, who stands convicted on this record of the same lies and fraud of which Scales was guilty.

Arthur Watts, whose stout and unbroken denial of guilt barely served to keep his name out of the above findings of fact as an arsonist for failure of the hearsay declarations of an illiterate farm hand to meet the defendants' burden of proof.

Mrs. Jones Boyd, whose rehearsed testimony and evasive answers did little to rebut the defendants' case even if all the facts she alleged be taken as true.

Roy McCree, who was so deaf it was not always certain he understood the questions he answered in court, much less the out-of-court conversations he claimed to have heard.

Jack Cole, who was clearly shown to have been lying under oath as to the principal subjects of his testimony either in this court or another.

Oakley Trice, Mrs. Trice's husband, whose testimony oddly conflicted with that of Mr. and Mrs. Jones only on whether he or Scales originated a certain telephone call and whether Scales was at his home or at the Joneses' —the content of the conversation being essentially similar by either version.

Even if the arson issue had to be decided only on the basis of Jones's testimony in court and Nelson's established out-of-court statements versus the plaintiff's rebuttal witnesses, a jury verdict for the defendants would have been fully supported. Yet all of this could be set to one side and there would still remain a massive circumstantial case against Scales. Only findings of fact numbered 5, 8, 9, 12 and 13 would be eliminated, and No. 7 would be modified to delete reference to the unseasonal nature of the hay operation. If, in addition, the jury were so unreasonable as to accept Hewgley's denial of his visit to McKnight against the testimony of two unimpeached witnesses, Hewgley's identity would be deleted from No. 10. The other twenty findings were established by admissions and stipulations, by the plaintiff's own witnesses, or by uncontradicted testimony of unimpeached defense witnesses.

And finally there stands the legal presumption against the plaintiff arising from her unexplained failure to present certain witnesses shown to have been in position to testify to facts in her favor if such facts existed— herself; Buford Hill, the bookkeeper on whom her father said he relied for the grain inventory; James Gable, a regular employee at the mill; and her mother and brother, who should have been able to throw some light on Scales's movements on the morning and afternoon before the fire.

By any analysis associated with logic, the verdict of the jury was contrary to the great preponderance of the evidence, and it must therefore be set aside and a new trial granted on the issue of arson.

E. *Conduct of Counsel*

[20] The defendants allege as ground for a new trial the conduct of the plaintiff's counsel before and during the trial. There can be no doubt that the record shows the plaintiff's counsel in an unfavorable light. But a motion for a new trial is not the proper occasion for placing a member of the bar of this court on trial. His conduct should be discussed here only to the extent that it is alleged to have prejudiced the defendants or deprived them of a fair trial.

Without reviewing the evidence in detail, the court finds that:

1. Mrs. Trice and her counsel improperly took a sworn statement from James Nelson in an *ex parte* interview during a recess in the taking of Nelson's deposition in which Nelson repudiated the testimony given on the deposition.

2. Thereafter the plaintiff's counsel approached defense counsel about resumption of Nelson's cross-examination pursuant to his reservation without disclosing to them that Nelson had changed his testimony.

3. Before taking the statement they informed Nelson that he had been indicted for arson in the burning of the mill and conveyed to him the understanding that his confession previously given could be used against him in the prosecution on the indictment.

4. The statement obtained from Nelson was almost certainly false in its overall import and was unquestionably false insofar as it charged that D. C. Lee made up

Nelson's prior confession story and obtained a recording of it by trickery.

5. The witness subsequently perjured himself in this court in the course of testifying in support of the statement improperly obtained by Mrs. Trice and her counsel.

6. The plaintiff's counsel presented Jack Cole as a rebuttal witness for the very purpose of testifying to the truth of matters the plaintiff's counsel knew or could have known the witness had previously testified in a related trial were not true.

This conduct was improper, whether knowingly so or not, and in view of the very strong case of arson made out by the defendants by other evidence, the court cannot say that the results of this improper conduct did not gain his client an unfair advantage that resulted in the jury's verdict against the defendants on the arson defense.

Accordingly, prejudice has clearly been shown. The verdict must therefore be set aside and a new trial granted on the issues of arson and the good or bad faith of the plaintiff.

It will not be necessary to discuss here the other allegations relating to the conduct of the plaintiff's counsel on the trial, but the court deems it pertinent to discuss in this context a matter brought up by plaintiff's counsel in one of his post-trial briefs.

In his "Reply Brief on Behalf of Plaintiff, Grounds 1, 2, 3, 4, 14 and 15 of Defendants' Motion for Judgment Notwithstanding the Verdict and in the Alternative for a New Trial" filed December 10, 1962, counsel stated at page 18:

> "In neither of the three versions of Lee and Nelson on the wire recorder was there a description of the

car Nelson rode to town in after Jones had transferred him over on the Wales Road."

At page 10 of the official court reporter's transcript of the wire-recorded interviews appears the following exchange:

"Q. What kind of car did he have?
"A. Some kind of yellowish-looking, cloth top Chevrolet, I believe. Yellow. Convertible, I believe."

The court had the recording, Defendant's Exhibit 15 for Identification, replayed in chambers to confirm this transcript. This confirmed that Nelson was the first to provide the description of the car that plaintiff's counsel suggests defense counsel put in his mouth at a later date.

In the course of this replaying, the court and the reporter discovered that the "yellow" description also appeared later on the wire recording but was not transcribed through error. At page 12 of the transcript the reporter originally transcribed an exchange between Dunlap and Nelson as follows:

"Q. You were in his car?
"A. In this other man's car.
"Q. Did he have a cloth-topped car?
"(No distinguishable answer.)"

The replaying disclosed that this exchange actually was as follows:

"Q. You were in his car?
"A. In this other man's car.
"Q. A yellow cloth-topped car?
"A. Yes, sir."

The transcript will be so corrected before it is filed as a part of the record in the case.

The plaintiff's counsel, of course, may not be charged with knowledge of Mr. Dunlap's question about the "yellow cloth-topped car," but there is no excuse for his failure to discover the description given by Nelson himself before falsely accusing defense counsel of inventing the description at a later time.

F. *Conduct of Juror.*

[21] Immediately after the jury rendered its verdict in this case and was discharged, Mrs. Lucille S. Hardison, one of the jurors, and Mrs. Roy Arney, sister of plaintiff and daughter of Joe W. Scales, embraced each other in full view of the court and all spectators. This conduct was cited by defendants as one of their grounds for a new trial but nothing further was said about it by brief or in oral argument on the first hearing. The court was of the opinion that the question should be disposed of and an additional hearing was therefore ordered.

At the conclusion of the additional hearing, the court was of the opinion and stated that the defendants had failed to establish that the jury's verdict had been influenced by any misconduct on the part of the juror. See Palmer v. Miller, 60 F. Supp. 710 (D. Mo. 1945).

A new trial, therefore, cannot be granted on the basis of this ground of the motion.

IV.

The Counterclaims.

The disposition to be made of the defendants' motion for judgment notwithstanding the verdict raises further questions as to the disposition of the defendants' counterclaims, which would have been pretermitted if the jury's verdict had been sustained. As indicated earlier, the claim

for the statutory penalty for bad faith litigation, alternatively stated in the first and second counts of the counterclaim, is undoubtedly good, but the question of the proper manner for determination of the amount of the penalty is a difficult one. The third and fourth counts of the counterclaims, seeking judgment over against the Scales estate for amounts the defendants might be required to pay the mortgagees likewise present a difficult question in view of the out-of-court settlement on the payment to the mortgagees.

The case must therefore be set down for further hearing on these questions before a final judgment can be entered.

V.

Summary.

In summary, the court holds:

1. The plaintiff's motion for relief from a portion of the amended judgment previously entered must be dismissed as untimely.

2. The plaintiff's notice of appeal is ineffective to divest the court of jurisdiction to dispose of the issues before it.

3. The defendants' motion for judgment notwithstanding the verdict is well taken on the ground that Scales was shown to have been guilty of fraud, false swearing, and willful misrepresentation as a matter of law, but it is not well taken on other grounds.

4. The defendants' motion for new trial is well taken on the grounds that the verdict was contrary to the great preponderance of the evidence on the issue of arson, fraud, false swearing, and willful concealment or misrepresentation and on the ground that the improper conduct of the

plaintiff's counsel deprived the defendants of a fair trial of the arson issue, but it is not well taken on the other grounds.

5. The defendants' counterclaims under these holdings raise questions that require further hearing.

Accordingly, an interlocutory order will be entered setting aside the verdict insofar as it finds that Scales did not burn this mill or cause it to be burned and insofar as it finds that Scales was not guilty of fraud, false swearing or willful concealment or misrepresentation of material matters as against these defendants and setting aside the judgment heretofore entered against these defendants. No new judgment will be entered, however, pending determination of the questions raised by the counterclaims.

• • • • • • • •

[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 666

HELEN CORINNE SCALES TRICE, Executrix,
Petitioner,

vs.

COMMERCIAL UNION ASSURANCE
COMPANY, LTD., et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO A PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Lon P. MacFarland
Middle Tennessee Bank Bldg.
Columbia, Tennessee

William B. Cain
Hatcher Building
Columbia, Tennessee

Jon W. Henry, Jr.
121 South First
Pulaski, Tennessee

D. C. Lee
First National Bank Bldg.
Pulaski, Tennessee
Attorneys for Respondents

R. L. Stamps Co., Inc., 400 Cherry Street, Kansas City, Mo. 64106, Victor 1-4000

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MAY IT PLEASE THE COURT:

This case was first tried before the United States District Court for the Middle District of Tennessee, Columbia Division, in May, 1962. The opinion of the District Court is published at 213 F. Supp. 675. This judgment was appealed and the opinion of the Sixth Circuit Court

of Appeals rendered July 14, 1964 is reported at 334 F. 2d 673, certiorari denied 380 U. S. 915, 13 L. ed. 2d 801, 85 S. Ct. 895. The case was remanded to the District Court and again tried in September, 1966. The District Court opinion on this second trial is unreported, but the opinion of the Sixth Circuit Court of Appeals following the appeal from the second trial in the District Court is reported at 397 F. 2d 889.

STATEMENT OF THE CASE

Respondents accept the statement of the case of the petitioner with the following supplement:

The case was first tried before a jury in May of 1962. In this first trial nine separate insurers were defendants, seven of them by reason of policies issued on buildings and equipment, and two of them by reason of policies issued on grain and related commodities allegedly stored in the mill. The jury returned a verdict on special interrogatories, finding that Scales did not procure the burning of the mill; that Scales was guilty of fraud, false swearing, willful concealment and misrepresentation of material facts concerning the grain allegedly stored in the mill; that because of such fraud, etc., as to the grain policies Scales was liable to the two companies insuring grain and related commodities in the amount of $3,000.00 under Tennessee Code Annotated, Section 56-1106, for bringing suit in bad faith; that Scales was not guilty of fraud, false swearing, misrepresentation of material facts or concealment as to the building and machinery policies; that the seven companies insuring buildings and machinery were liable to the Scales estate for $25,000.00 on the buildings and $20,000.00 on machinery and equipment.

The Scales estate promptly paid the $3,000.00 penalty assessed against it by reason of its fraudulent claim against the grain insurers.

The trial court subsequently sustained the motion of the building and machinery insurers for judgment notwithstanding the verdict on the grounds that Scales was guilty of fraud, false swearing, willful concealment and misrepresentation of material fact as a matter of law. Further, pursuant to motion of the building and machinery insurers, the trial court granted an alternative new trial on the issues of fraud, etc., and arson, holding that the jury verdict against the building and machinery insurers contravened the overwhelming weight of the evidence. The trial court further granted in the alternative a new trial to the building and machinery insurers because of the prejudicial misconduct of counsel for the plaintiff.

213 F. Supp. 675.

The Scales estate then appealed the action of the trial court to the Court of Appeals for the Sixth Circuit.

The Sixth Circuit Court of Appeals reversed the trial court, holding that it was error for the trial judge to enter judgment notwithstanding the verdict on the question of fraud and false swearing because such did not appear as a matter of law but rather constituted a question of fact for determination by the jury. The Court of Appeals affirmed the alternative action of the trial court in granting a new trial on both the arson and fraud issues.

334 F. 2d 673.

The Scales estate petitioned the Supreme Court for certiorari to review the action of the Court of Appeals in failing to reverse the District Court as to the alternative

motion for a new trial and in failing to reinstate the jury verdict against the building and machinery insurers. The Supreme Court denied certiorari.

380 U. S. 915.
13 L. ed. 2d 801.
85 S. Ct. 895.

The case was remanded to the District Court and tried again before another jury which was unable to agree as to the arson issue, but found Scales to have been guilty of fraud, false swearing, willful concealment and misrepresentation of material facts as to the building and machinery insurers, thus voiding the building and machinery policies and further pursuant to Tennessee Code Annotated, Section 56-1106, rendered a judgment against the Scales estate and in favor of the building and machinery insurers in the amount of $5,000.00 upon a finding that suit had been brought against them in bad faith.

The Scales estate appealed to the Sixth Circuit Court of Appeals and that Court affirmed the judgment of the trial Court.

397 F. 2d 889.

The Scales estate petitioned the Circuit Court of Appeals to rehear, which petition was denied, and the Scales estate has now filed this petition for certiorari in the Supreme Court of the United States.

ARGUMENT

The argument presented by the petitioner in support of the petition for certiorari is very much the same argument that was presented in support of the petition for certiorari following the first trial of this case which was docketed in this Court for the October term 1964 as No.

757. That petition for certiorari was denied. 380 U. S. 915, 13 L. ed. 2d 801, 85 S. Ct. 895.

The principal case relied upon by the petitioner is *Tennant* v. *Peoria & Pekin Union Rwy. Co.*, 321 U. S. 529, 64 S. Ct. 409, 88 L. ed. 520, rehearing denied 321 U. S. 802, 64 S. Ct. 610, 88 L. ed. 1089. This is the same case heavily relied upon by the petitioner in her 1964 petition for certiorari.

The present petition for certiorari is nothing more than a reiteration of the 1964 petition. Indeed, it makes not a single complaint about the second trial in the District Court, nor about the second action of the Court of Appeals. It is merely another attack upon the action of the trial court in the first trial of this cause and upon the action of the Court of Appeals in the first trial of this cause and upon the action of the Supreme Court in its denial of certiorari on the first trial.

The previous denial of certiorari by this Court constitutes the law of the case and is not now subject to further review.

Roberts v. *Cooper*, 61 U. S. 467, 15 L. ed. 969.
Worley v. *Elliott*, 231 F. 2d 526 (Sixth Circuit).
White v. *Murtha*, 377 F. 2d 428 (Fifth Circuit).

As held in *White* v. *Murtha*, 377 F. 2d 428, 431:

> "The 'law of the case' rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that 'there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members', and that it would be impossible for an appellate court 'to perform its du-

ties satisfactorily and efficiently' and expeditiously 'if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal' thereof."

Aside from the application of the law of the case rule, the position taken by the petitioner is simply without support in any case from any jurisdiction. Petitioner construes *Tennant* v. *Peoria & Pekin Union Rwy. Co.*, 321 U. S. 529, 64 S. Ct. 409, 88 L. ed. 520, to constitute a complete destruction of the right of a trial court to grant a new trial because the verdict of a jury is against the overwhelming weight of the evidence. In so construing the case petitioner falls into the same fallacy which she asserted in her 1964 petition for certiorari, that is, failure to distinguish between the law as applicable to a situation where a trial court or appellate court sets aside a jury verdict *and directs a verdict for the opposite party*, and a situation wherein a trial court disapproves the jury verdict, sets it aside and *grants a new trial.*

In *Tennant* v. *Peoria & Pekin Union Rwy. Co.*, 321 U. S. 529, 64 S. Ct. 409, 88 L. ed. 520, plaintiff brought an action under the Federal Employer's Liability Act. The jury returned a verdict for the plaintiff and the *District Court entered judgment accordingly.* On appeal by the defendant the Seventh Circuit Court of Appeals reversed the judgment finding that while there was evidence of negligence by the defendant, there was no substantial proof that this negligence was the proximate cause of Tennant's death. The Court of Appeals further held that the District Court should have *directed a verdict in favor of the respondent or allowed its motion for judgment notwithstanding the verdict.*

The Supreme Court of the United States reversed the Seventh Circuit Court of Appeals holding

> "Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. *Thus, to enter a judgment for respondent notwithstanding the verdict* is to deprive petitioner of the right to a jury trial." (Emphasis added)

The opinion of the trial court in *Tennant* v. *Peoria & Pekin Union Rwy. Co.* is unreported.

The opinion of the Court of Appeals of the Seventh Circuit in *Tennant* v. *Peoria & Pekin Union Rwy. Co.* is reported at 134 F. 2d 860. Nowhere in the opinion of the Seventh Circuit Court of Appeals, nor in the opinion of the Supreme Court does it appear that a motion for a new trial was ever filed in the case. The sole complaint of the defendant acted upon by the Seventh Circuit Court of Appeals was the failure of the trial Judge to direct a verdict for the defendant at the close of the plaintiff's evidence. The Court of Appeals for the Seventh Circuit held that the trial court erred in not directing a verdict and remanded the case to the trial court for entry of judgment for the defendant. The Supreme Court of the United States reviewed the action of the Seventh Circuit Court of Appeals and reversed, holding that the trial court was correct in not directing a verdict.

In the case at Bar the Sixth Circuit Court of Appeals followed this very rule in its opinion on the first appeal reported at 334 F. 2d 673. The Court of Appeals there held that the trial court erred in granting judgment notwithstanding the verdict.

Appendix A-16, 17.

The difference in the Tennant case and the case at Bar lies in the fact that these respondents filed a combined motion for judgment notwithstanding the verdict *or in the alternative for a new trial.*

Such a procedure was clearly proper.

> *Montgomery Ward & Co.* v. *Duncan,* 311 U. S. 243, 85 L. ed. 147, 61 S. Ct. 189.

The trial court granted both the motion for judgment notwithstanding the verdict and the alternative motion for a new trial, the alternative motion being sustained upon two grounds, to-wit:

1. The verdict of the jury was against the overwhelming weight of the evidence on the issues of fraud, etc., and arson;

2. The plaintiff's counsel was guilty of prejudicial misconduct.

Appendix A-54, 55.

The Court of Appeals for the Sixth Circuit in reviewing the action of the trial court in sustaining both the motion for judgment notwithstanding the verdict and the alternative motion for a new trial followed *Tennant* v. *Peoria & Pekin Union Rwy. Co.,* 321 U.S. 529, 64 S. Ct. 409, 88 L. ed. 520, and reversed the judgment notwithstanding the verdict. The Court thereupon proceeded to follow the undisputed rule that the action of a trial court in granting or refusing a motion for a new trial is a matter resting in the discretion of the trial Judge and is not reviewable except for an abuse of discretion.

> "On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false,

> or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. *The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right.*" (Emphasis added)

Aetna Cas. & Sur. Co. v. *Yeatts*, 122 F. 2d 352.

The distinction which the petitioner in the case at Bar overlooks is clearly stated in *General American Life Ins. Co.* v. *Central Nat. Bank of Cleveland*, 136 F. 2d 823, as follows:

> "* * *, the mental process in deciding a motion to direct a verdict is very different from that used in deciding a motion to set aside a verdict as against the weight of evidence. In the former there is no weighing of plaintiff's evidence with defendant's. It is only an examination into the sufficiency of plaintiff's evidence to support a burden, ignoring defendant's evidence. In the latter, it is always a comparison of opposing proofs."

The case at Bar is directly in line with and governed by the undisputed rule laid down in *Turner* v. *United States*, 229 F. 2d 944. That case originating in the Federal District Court for the Eastern District of Tennessee involved a suit between the wife and the mother of a deceased war veteran to determine who was the beneficiary of certain government insurance. The case was tried before a jury which returned a verdict in favor of the mother. The trial court set aside the verdict and granted a new trial. On appeal the Sixth Circuit Court of Appeals affirmed.

> "The controlling question is whether the order of the District Court granting a new trial constituted a clear abuse of discretion. *Washington Times Com-*

pany v. *Bonner*, 66 App. D. C. 280, 86 F. 2d 836, 848, 110 A.L.R. 393; *Kansas City Stockyards Company of Maine* v. *Anderson*, 3 Cir., 199 F. 2d 91, 95, 36 A.L.R. 2d 1; *Spero-Nelson* v. *Brown*, 6 Cir., 175 F. 2d 86, 89; *United States* v. *Johnson*, 327 U.S. 106, 112-113, 66 S. Ct. 464, 90 L. ed. 562. It was held in the Spero-Nelson case that where the jury's verdict resolves a factual question the trial court's action in overruling such motion cannot be reviewed by the Court of Appeals unless it involves an abuse of discretion. The granting or refusing of a new trial is a matter resting in the sound discretion of the trial judge and his action thereon is not reviewable upon appeal save in the most exceptional circumstances. *Aetna Casualty & Surety Co.* v. *Yeatts*, 4 Cir., 122 F. 2d 350-354. We therefore are concerned only as to whether the District Court clearly abused its discretion in granting the new trial. *Cf. Hill* v. *Pennsylvania Greyhound Lines, Inc.*, 3 Cir., 174 F. 2d 171, 172. An appellate court reviewing an order granting a new trial will consider all intendments in favor of the order made by the trial judge. The order will not be reversed if the record discloses any tenable ground in support of the order. *Cicrich* v. *State Industrial Accident Commission*, 143 Or. 627, 635, 636, 23 P. 2d 534. . . .

"As declared by the Fourth Circuit in *Aetna Casualty & Surety Co.* v. *Yeatts*, supra, 122 F. 2d at page 352, Judge Parker writing the opinion:

> 'It is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice. . . .' "

No better authority in refutation of the assertions made by the petitioner can be found than *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 33 S. Ct. 523, 57 L. ed. 879, a case strongly relied upon by the petitioner.

In that case the Supreme Court held:

"These decisions make it plain, first, that the action of the Circuit of Appeals in setting aside the verdict and assuming to pass upon the issues of fact, and to direct a judgment accordingly, must be tested by the rules of the common law; second, that while under those rules that court could set aside the verdict for error of law in the proceedings in the Circuit Court and order a new trial, it could not itself determine the facts; and, third, that when the verdict was set aside there arose the same right of trial by jury as in the first instance. How, then, can it be said that there was not an infraction of the Seventh Amendment? When the verdict was set aside the issues of fact were left undetermined, and until they should be determined anew no judgment on the merits could be given. The new determination, according to the rules of the common law, could be had only through a new trial, with the same right to a jury as before. Disregarding those rules, the Circuit Court of Appeals itself determined the facts, without a new trial. Thus, it assumed a power it did not possess, and cut off the plaintiff's right to have the facts settled by the verdict of a jury."

* * *

"The judgment of the Circuit Court of Appeals is accordingly modified by eliminating the direction to enter judgment for the defendant notwithstanding the verdict, and by substituting a direction for a new trial."

Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. ed. 879.

CONCLUSION

The petitioner in this cause brought to this Court a petition for certiorari four (4) years ago asserting the very same position which she asserts in the present petition. This Court denied the petition for certiorari.

380 U. S. 915.

13 L. ed. 2d 801.

85 S. Ct. 895.

The petitioner then lost a jury verdict on a pure question of fact.

She appealed again to the Sixth Circuit Court of Appeals and lost.

397 F. 2d 889.

She now petitions this Court, raising not a single question concerning any of the proceedings of the second trial, but rather reverts back to the same complaint which she asserted four (4) years ago.

Respondents respectfully submit that the previous action of this Court in denying certiorari upon these same grounds constitutes the law of the case.

Respondents further submit that the present petition for certiorari presents no question properly the subject of a writ of certiorari.

Respondents aver that the application for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM B. CAIN
Hatcher Building
Columbia, Tennessee

LON P. MACFARLAND
Middle Tennessee Bank Bldg.
Columbia, Tennessee

JOE W. HENRY, JR.
121 South First
Pulaski, Tennessee

D. C. LEE
First National Bank Bldg.
Pulaski, Tennessee

Attorneys for Respondents

SUPREME COURT, U. S.
DEC 7 1960
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 655

HELEN CORRINE SCALES TRICE, Executrix,
Petitioner,

vs.

COMMERCIAL UNION ASSURANCE COMPANY, LTD., ET AL,
Respondents.

SUPPLEMENTAL AND REPLY BRIEF ON BEHALF OF HELEN CORRINE SCALES TRICE, EXECUTRIX, PETITIONER

FRED FISHER,
511 American Trust Building,
Nashville, Tennessee 37201,
Attorney for Petitioner.

St. Louis Law Printing Co., Inc., 415-17 N. Eighth St., CEntral 1-1877

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968,

No. 666.

HELEN CORINNE SCALES TRICE, Executrix,
Petitioner,

vs.

COMMERCIAL UNION ASSURANCE COMPANY, LTD., Et Al.,
Respondents.

SUPPLEMENTAL AND REPLY BRIEF ON BEHALF OF HELEN CORINNE SCALES TRICE, EXECUTRIX, PETITIONER.

FOREWORD.

Justitia non novit patrem nec matrem; solam veritatem spectat justitia.

(Justice knows not father nor mother; justice looks at Truth alone.)

1 Bulst. 199.

MAY IT PLEASE THE COURT:

Respondents evade the question presented by Petitioner's application for the writ of certiorari in this case. The

Argument in support of the petition concluded with the following statement:

> "And, clearly it was beyond the power of the courts below to make the finding that plaintiff and her counsel wrongfully procured Nelson to change his testimony. The verdict of the jury on the first trial necessarily imports the finding that they **rightfully** did that, for they brought out the truth. No one will now gainsay that And yet, by a curious and unprecedented line of reasoning the Court of Appeals has reached the result of denying petitioner the jury verdict which resulted from a fair trial."
>
> **Petition, page 16.**

Respondents, in their brief in opposition to the Petition, do not dispute the above assertion. Instead, they assert that the previous denial of certiorari by the Court constitutes the "law of the case" and is not now subject to further review. In urging this proposition respondents are, of course, in grievous error. It would be carrying coals to Newcastle to spend time and space citing the well-nigh numberless authorities in which it has been declared that the refusal by this Court to grant certiorari imports no expression of opinion on the merits. Two of the most recent decisions so declaring are: **Polites v. U. S., 364 U. S. 426, 81 S. Ct. 202, 5 L. ed. 2d 173 and U. S. v. Shubert, 348 U. S. 222, 75 S. Ct. 277, 99 L. ed. 279.**

Respondents further assert that the present petition is nothing more than a reiteration of the prior petition and that it makes not a single complaint about the second action of the Court of Appeals. Respondents, apparently, labor under a very serious misapprehension of the petition. Petitioner is satisfied that her petition makes it entirely clear that the gravamen of her present complaint and application is that the Court of Appeals, in its opin-

ion on the appeal from the final judgment, referring to the action of the first trial judge basing his grant of a new trial in part on "prejudicial misconduct of counsel" said that the evidence upon which the judge relied was outlined in his opinion reported in **213 F. Supp. 675**, and that there was nothing in the record which would warrant a change in its opinion, and that "we adhere to it."

With respect to this finding of the first trial judge (concurred in by the court of appeals in its latest opinion) petitioners showed that: a) insofar as it involved a conclusion of law it was unsound (Petition, page 7) and b) as a conclusion of **fact** it was in contravention of the Seventh Amendment. Petitioner stated:

> "The principal fact tried before the jury in this case was whether James Nelson told the truth in the discovery deposition when he said he was hired by Joe W. Scales to set fire to the mill and that he did set fire to the mill, or whether he told the truth when he testified on the witness stand that this story was a pure fabrication. The jury on the first trial, after having heard all the evidence concerning Nelson's repudiation of his first statement, found that Joe W. Scales did not procure the burning of the mill. The jury on the second trial failed to agree. The fact tried by the jury, in this case has been re-examined by the courts and found contrary to the finding of the jury. On this basis, the courts below have held that the verdict of the jury cannot stand.
>
> "By the Seventh Amendment the fact tried by the jury and found in petitioner's favor could not be re-examined by the courts and found against her. But, this is precisely what has been done in this case.
>
> . . . . . .
>
> "The first jury found for the plaintiff after hearing both Nelson (and) the lawyer who took the orig-

inal statement about setting fire to hay and gasoline on his wire recorder.

"Judge Gray, the first trial judge, said that the jury was capricious to believe Nelson's testimony on the witness stand that he did not set fire to the mill. And now, the Court of Appeals has said that it has reviewed the evidence and approves Judge Gray's finding that plaintiff-appellant's counsel was guilty of unprofessional misconduct in interviewing Nelson after his discovery deposition had been taken and taking a sworn statement from him repudiating the whole thing."

Petition, pages 8, 14.

The Court of Appeals, in its opinion on the first appeal reversing the judgment notwithstanding the verdict, said:

"A review of the record in this case reveals that there was no abuse of discretion by the Trial Court in granting the defendant's motion for a new trial. There was substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing in the proof of loss and that he had participated in procuring the burning of the subject property.

"Having concluded that the judgment notwithstanding the verdict should be set aside but that the trial Court did not abuse its discretion in granting a new trial, it is not necessary to consider other issues raised in this appeal. The action of the Trial Court in granting the judgment notwithstanding the verdict will be reversed but the order granting a new trial will be affirmed and the case remanded accordingly."

App. A18.

It is a settled rule that a judgment of reversal is not necessarily an adjudication by the appellate court of any

other than the questions in terms discussed and decided, and on second review all questions which appear on the record and have not already been decided are open for consideration. **Mutual Life Ins. Co. of New York v. Hill, 193 U. S. 551, 24 S. Ct. 538, 48 L. ed. 788; New York Life Ins. Co. v. Gamer (C. A. 9th), 106 F. 2d 375, 377; Hansen & Rowland, Inc. v. C. F. Lytel Co., Inc., et. al. (C. A. 9th), 167 F. 2d 998.**

The Court of Appeals, in its first opinion, did not in terms discuss and decide the question whether the trial judge abused his discretion in finding and holding that plaintiff's counsel was guilty of unprofessional misconduct in interviewing the defendant's witness, James Nelson, and obtaining from him a repudiation of his testimony on discovery deposition. But, on the appeal from the final judgment this very question was raised again and the Court of Appeals, this time, decided the question by the sweeping statement quoted above amounting to a concurrence with the findings made by the first trial judge which were the basis of the grant of the new trial to the insurance companies.

This concurrence is quite remarkable because of the new state of facts bearing on the finding of prejudicial misconduct of plaintiff's counsel presented by the record on the second trial.

Judge Gray, in his attempt to exonerate defendants' counsel for their conduct in obtaining the confession to burning the mill by James Nelson (which the jury had found to be false) by aspersing plaintiff's counsel said:

> "4. The statement obtained from Nelson was almost certainly false in its overall import and was unquestionably false insofar as it charged that D. C. Lee (one of defendants' attorneys) made up Nelson's prior confession story and obtained a recording of it by trickery.

"5. The witness (Nelson) subsequently perjured himself in this court in the course of testifying in support of the statement improperly obtained by Mrs. Trice and her counsel."

App. A50-A51.

As strange as it may seem, the defendants, on the second trial, abandoned the statement which Mr. Lee had obtained from Nelson for the first trial and came out with a brand new theory about how the fire could have been started with hay and gasoline without Nelson suffering any burns. This switch was fully shown to the Court of Appeals. Petitioner prints in an appendix to this Supplemental and Reply Brief pages 28-35 of her Main Brief in the Court of Appeals to demonstrate how baseless the "confession" obtained from Nelson by defendants' counsel was.

The "opinion" of the Court of Appeals, sustaining the grant of a new trial by the first judge was that he did not abuse his discretion because there was "substantial evidence in the record" which would have supported a verdict for the defendants*—a verdict the jury did not find (App. A. 18). And this on issues as to which the defendants carried the burden of proof!

The undisputed fact that the defendants, for the second trial, invented a claim about how the fire could have been

---

* The trial judge, in his memorandum opinion said: "Even if the arson issue had to be decided only on the basis of Jones' testimony in court and Nelson's established out-of-court statements versus the plaintiff's rebuttal witnesses, a jury verdict for the defendants would have been fully supported" (App. A 49). Elsewhere, in the opinion, the judge said: "Jones, of course, was seriously discredited by the nature of his own testimony, and by his admitted hostility to Mrs. Trice, and by obviously good reasons he had for that hostility" (App. A 48). The judge thought, too, that the fact that the property was **underinsured** was a "situation" which was "clearly one in which arson could have been profitable" (App. A 40).

started with gasoline wholly unsupported by any evidence and admitted this fact made no difference to the Court of Appeals. The very fact that the Court of Appeals was willing to disregard the fabrication of a new claim or theory by defendants' counsel for the second trial is alone enough to show that the judgment in this case is a mockery of justice. And, defendants endeavor to persuade this Court that the present petition "makes not a single complaint about the second trial in the District Court, nor about the second action of the Court of Appeals" (Reply Brief, p. 5).

Tennant v. Peoria.

Defendants cavil much about the rule so categorically expressed by this Court in **Tennant v. Peoria.** All manner of differences and distinctions are seen in their effort to conjure the rule away. The Court would have been spared wrestling with a greater portion of their brief, had defendants cited the case of **Duncan v. Duncan,** a decision by the Sixth Circuit Court of Appeals handed down on May 4, 1967, and reported in **377 F. 2d 49.** In that case a division of three judges of the same court of appeals reversed the same district court for an abuse of discretion in granting plaintiffs a new trial on the ground that the verdict was against the weight of the evidence when the defendant appealed from the final judgment in favor of the plaintiffs, citing the rule of **Tennant v. Peoria.** In the opinion of this division of the Court of Appeals, the following comprehensive statement of the law on the subject of the permissible limits of court action in granting a new trial on the weight of the evidence was made:

[1-5] In ruling upon a motion for a new trial based on the ground that the verdict is against the weight of the evidence, a district judge must compare the opposing proofs and weigh the evidence (Felton v. Spiro, 78 F. 576 (6th Cir. 1897) (Taft, J.), General American Life Ins. Co.

v. Central Nat'l Bank, 136 F. 2d 821 (6th Cir. 1943)), and "it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence * * *." Aetna Cas. & Surety Co. v. Yeatts, 122 F. 2d 350, 352 (4th Cir. 1941), cited with approval in Turner v. United States, 229 F. 2d 944, 946 (6th Cir.), cert. denied, 351 U. S. 970, 76 S. Ct. 1038, 100 L. Ed. 1489 (1956). The power of the trial judge to set aside a verdict as against the weight of the evidence and grant a new trial is thus a check or limitation on the jury's power to render a final and binding verdict, to the end that a miscarriage of justice does not result. However, "[c]ourts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 412, 488 L. Ed. 520 (1944); Werthan Bag Corp. v. Agnew, 202 F. 2d 119, 122 (6th Cir. 1953). Thus, while the district judge has a duty to intervene in appropriate cases, the jury's verdict should be accepted if it is one which could reasonably have been reached. In applying these two broad principles defining the permissible limits of court action in granting a new trial on the weight of the evidence, the district judge must, as is generally stated, exercise his sound judicial discretion. See Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 251, 61 S. Ct. 189, 85 L. Ed. 147 (1940); Devine v. Patteson, 242 F. 2d 828 (6th Cir.), cert. denied, 355 U. S. 821, 78 S. Ct. 27, 2 L. Ed. 2d 36 (1957), and cases cited infra. See generally 6 Moore, Federal Practice, ¶ 59.08 [5] (2d ed. 1953).

[6] Although an order granting a new trial is generally not appealable, it is clear that such orders are reviewable on appeal from the final judgment in the second trial. See North Texas Producers Association v. Metzger Dairies,

Inc., 348 F. 2d 189 (5th Cir. 1965), cert. denied, 382 U. S. 977, 86 S. Ct. 545, 15 L. Ed. 2d 468 (1966). Indeed, the order dismissing defendant's prior premature appeal stated that "the correctness of the District Court's order would be reviewable, of course, upon an appeal from the final judgment disposing of the case," citing Ford Motor Co. v. Busam Motor Sales, Inc., 185 F. 2d 531 (6th Cir. 1950).

[7] With respect to the applicable scope of review of a District Court decision granting or denying a new trial on the basis of the weight of the evidence, it is well settled that reversal may be predicated only upon an abuse of discretion. Cutter v. Cincinnati Union Terminal, 361 F. 2d 637 (6th Cir. 1966); Southern R. R. Co. v. Miller, 285 F. 2d 202, 85 A. L. R. 2d 842 (6th Cir. 1960); accord, Mooney v. Henderson Portion Pack Co., Inc., 339 F. 2d 64 (6th Cir. 1964); Werthan Bag Corp. v. Agnew, 202 F. 2d 119 (6th Cir. 1953); Spero-Nelson v. Brown, 175 F. 2d 86 (6th Cir. 1949). Cf. Trice v. Commercial Union Assur. Co., 334 F. 2d 673 (6th Cir. 1964), cert. denied, 380 U. S. 915, 85 S. Ct. 895, 13 L. Ed. 2d 801 (1965) ("clear abuse of discretion"); Turner v. United States, 229 F. 2d 944 (6th Cir. 1956); Hunt v. Standard Brands, Inc., 72 F. 2d 822 (6th Cir. 1934).

There are few cases where an appellate court has reversed a decision of a district court in either granting or denying a motion for a new trial based on the ground that the verdict was against the weight of the evidence. There is not, however, a complete lack of precedent for such action.

In Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F. 2d 532 (2d Cir. 1965), cert. denied, 382 U. S. 983, 86 S. Ct. 559, 15 L. Ed. 2d 472 (1966), following the crash of one of defendant's planes, an action was brought for the wrongful death of one of the passengers. The flight

was international and thus liability, if established, was limited to $8,291.87 by the Warsaw Convention, unless the defendant was guilty of "wilful misconduct." The jury returned a verdict for defendant on all issues and the District Court granted plaintiff's motion for judgment n. o. v. as to liability, holding that the evidence established "wilful misconduct" as a matter of law. The district judge thus granted a new trial on the issue of damages, and also granted a conditional new trial on all issues should the judgment be reversed.

The court of appeals reversed the judgment in favor of plaintiff, stating:

> "We cannot even say that the pilot's or the airline's negligence was established as a matter of law, much less wilful misconduct. Once the case went to the jury, its verdict should not have been upset, if reasonable men could find in defendant's favor, as they certainly could here," Id. 346 F. 2d at 538.

In reviewing and reversing the conditional grant of a new trial on all issues, based on the ground that the verdict was against the weight of the evidence, the court stated:

> "We have already held that there was sufficient evidence to go to the jury. * * * To order a new trial on the asserted ground when there was sufficient evidence to go to the jury need not be an abuse of discretion in every case, see 6 Moore, Federal Practice, ¶ 59.08 [5], at 3817, 3820 (2d ed. 1953), but we find it was in this case. In light of the possible inferences as to what actually happened when the pilot began his letdown, we cannot agree that, viewed in light of the proper standard, the verdict could be called against the weight of the evidence."

The court then reinstated the original verdict in favor of defendant and set aside the judgment entered upon the second jury's determination of $924,396 damages.

In Lind v. Schenley Industries, Inc., 278 F. 2d 79 (3d Cir.) (En banc), cert. denied, 364 U. S. 835, 81 S. Ct. 58, 5 L. Ed. 2d 60 (1960), a case procedurally similar to *Berner*, the jury returned a verdict in favor of plaintiff, and the district judge entered judgment n. o. v. for defendant, and conditionally granted a new trial in the event the judgment was reversed. On appeal, the court reversed the judgment and proceeded to review the order granting a new trial. The first ground specified in support of this order, that the verdict was contrary to law, had been disposed of by the ruling on the judgment; the second ground, that the verdict was the result of error in the admission of evidence, was decided in plaintiff's favor. With respect to the one remaining ground, that the verdict was contrary to the weight of the evidence, the court noted:

> "New trials granted because (1) a jury verdict is against the weight of the evidence may be sharply distinguished from (2) new trials ordered for other reasons: for example, evidence improperly admitted, prejudicial statements by counsel, an improper charge to the jury or newly discovered evidence. In the first instance given it is the jury itself which fails properly to perform the functions confided to it by law. In the latter instances something occurred in the course of the trial which resulted or which may have resulted in the jury receiving a distorted, incorrect, or an incomplete view of the operative facts, or some undesirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible.
>
> * * * * * * * *
>
> "[W]here no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's ver-

> dict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial.
>
> "Where a trial is long and complicated and deals with a subject matter not lying within the ordinary knowledge of jurors a verdict should be scrutinized more closely by the trial judge than is necessary where the litigation deals with material which is familiar and simple, the evidence relating to ordinary commercial practices."

The court concluded that the district judge had substituted his judgment for that of the jury, thereby abusing his discretion, and the case was remanded back with instructions that the original verdict and judgment be reinstated.

The court in Fassbinder v. Pennsylvania R. R. Co., 322 F. 2d 859 (3d Cir. 1963) (En banc), held that the district judge had erred in failing to give effect to the inference of negligence warranted by the doctrine of *res ipsa loquitur*, and as a consequence had usurped the function of the jury. And in Georgia-Pacific Corp. v. United States, 264 F. 2d 161 (5th Cir. 1959), the court held the District Court's refusal to grant a new trial to be a clear abuse of discretion where the verdict was found to lack evidentiary support. See also Charles v. Norfolk & Western

Ry. Co., 188 F. 2d 691 (7th Cir.), cert. denied, 342 U. S. 831, 72 S. Ct. 55, 96 L. Ed. 628 (1951).

[8, 9] Appellant further contends that "in setting aside the verdict on the basis of his dissatisfaction with it [the district judge], lapsed into the inapplicable Tennessee practice, considered himself as a thirteenth juror and [thereby] committed a palpable error. * * *" Appellant seems to argue that isolated statements made by the district judge support this conclusion, but they may not properly be so viewed. Rather, those statements may only be considered in context and after having had due regard for the entire record, including particularly the evidence adduced at the first trial. Although a determination of this contention is not essential to the conclusion herein announced, it is observed that the argument is not supported by the record.

[10-12] Defendant's evaluation of the subject matter of this case as a "prime example of subject matter lying well within the comprehension of jurors" is deemed accurate. The first trial lasted less than two days, and there has been no showing that the jury considered any matter not properly before it. Moreover, plaintiffs' case of negligence against defendant could not be characterized as strong and it is clear that the credibility of plaintiffs' witnesses was in issue. In this respect it must be remembered that, as the court correctly charged the jury, the burden of proof in establishing negligence was on plaintiffs. The jury was not required to impose liability on defendant on the basis of the testimony of his wife and aged mother-in-law, and the jury's verdict in the first trial was, at the very least, a reasonable one. Therefore, on the basis of this record, it cannot be said that the District Court did not clearly abuse its discretion in granting plaintiffs a new trial on the ground that the verdict was against the weight of the evidence.

[13, 14] The fact that the second jury which heard the case returned a verdict in favor of plaintiffs, thus "reinforcing" the decision of the district judge that the verdict for defendant was against the weight of the evidence, is of no significance here. See Fassbinder v. Pennsylvania R. R. Co., supra. Even the most inexperienced attorney is aware of the fact that the outcome of any given case depends in large part upon the particular jury hearing it. As was stated in American Mfgrs. Mut. Ins. Co. v. Wilson-Keith & Co., 247 F. 2d 249, 256 (8th Cir. 1957), there with reference to an alleged error of law, "regardless of the different results in the trials, the function of this court is to review alleged errors and if [a party litigant] had become, in due course, vested with a valid judgment, they are entitled to have the action of the trial court which divested them of it reviewed for the alleged manifest error * * *."

For the foregoing reasons, the judgment in favor of plaintiffs is vacated, the order granting plaintiffs a new trial is reversed and the case is remanded back with instructions that the verdict and judgment in defendant's favor be reinstated.

Petitioner made a motion for a hearing before the Court of Appeals *en banc,* based principally upon the conflict between the decision of her first appeal and other decisions of the Sixth Circuit Court of Appeals. This motion is printed in the Appendix hereto. The motion was denied.

CONCLUSION.

Petitioner has shown that the Court of Appeals has decided an important question of federal law in a way that not only is in conflict with applicable decisions of this Court but which is also in conflict with its decisions in other cases. This surely ought to be good reason for granting certiorari

Respondents try to make petitioner, with her second appeal, appear to be like the importunate widow in the Bible (Luke, ch. 18). The comparison may not be wholly wanting in aptness. There is, however, an important difference. Luke's widow was appealing to an **unjust** judge. Petitioner believes that she is appealing to nine **just** judges.

Respectfully submitted,

.....

FYKE FARMER,
511 American Trust Building,
Nashville, Tennessee 37201,
Attorney for Petitioner.

[redacted]

APPENDIX

EXCERPT FROM BRIEF OF PLAINTIFF-APPELLANT IN COURT OF APPEALS.

III.

(Question No. 4.)

4. Should the Motion of the Plaintiff-Appellant for a Directed Verdict in Her Favor on the Issue of Whether the Insured, Joe W. Scales, Procured the Burning of the Mill and for a Judgment n. o. v. on This Issue Have Been Granted?

The Lower Court Answered This "No."

Appellant Contends This Should Have Been Answered "Yes."

Plaintiff's motion for a directed verdict on this issue was as follows:

> "Mr. Farmer: If the Court please, the plaintiff, Helen Corrine Scales Trice, Executrix of the estate of Joe W. Scales, respectfully moves the Court to direct the jury to return a verdict in her favor on the arson issue on this ground:
>
> That the only evidence tending to show that Joe W. Scales procured the burning of this mill was the evidence of R. C. Jones, and the discovery deposition of James Nelson, according to which a fire was set by the spreading of hay in the mill and the pouring out of a great quantity of gasoline, and two men, standing there, Nelson and Watts, standing there in the room where they poured out this huge quantity of gasoline, in the summer time, and striking matches to it, and after the fire was caught, they saw it was caught, walking out, and that story, the plaintiff says, is so inherently improbable and impossible, contrary to

common knowledge, the laws of properties of gasoline that ordinary people possess, have, and that it is so incredible that it would not support a jury verdict if one were returned."

Plaintiff's motion for a judgment n. o. v. filed within 10 days after the jury was discharged in accordance with Rule 50 (b) appears in the Appendix at page 36a. Here, appellant asks the Court to turn to the Appendix and read this motion.

Mr. Joe W. Henry, Jr., one of the defendants' counsel, in his opening statement to the jury said they would prove that two men, Arthur Watts and James Nelson, went into the mill and set fire to it in the following manner:

"The proof will show there was a quonset hut in connection with that mill, approximately two hundred feet long, and that there was a conveyor belt that ran the entire length of that quonset building, a belt so wide (indicating), and they went down to the western end of that where the switch was that operated it with the hay and the gasoline being two hundred feet away down at the eastern end, and they just put a little dab of hay right on that conveyor belt and then they struck a match to it, and then they just flicked the switch and as the belt just gradually took the hay and the fire down there to where the other hay and gasoline was, these two men climbed a fence and ran away. That's what our proof is going to show to you; that's why we won't pay."

Tr. Vol. 1, page 80.

The foregoing statement contained some elements of truth, viz:

a) There was a quonset hut which was a part of the mill. This building was approximately 200 feet long;

b) There was a conveyor belt that ran the entire length of the building.

All the remainder of the statement was a sheer fabrication, as appellant will now demonstrate.

First, the switch which controlled the conveyor belt at the time of the fire was not located down at the western end. It was located at the eastern end in the seed cleaning room. This was where James Nelson, in every statement he ever made, said he and the white man started the fire.

On the second trial, plaintiff called Roy B. Arney, who was familiar with the mill. Mr. Henry, who cross-examined him for the defendants, sought to develop by him that the switch which turned the conveyor on and off was located down at the western end of the quonset hut. Mr. Henry stated, during the course of his questioning, that he had been out there on Sunday before (Tr. Vol. 7, pp. 1330-1333). Mr. Arney testified that the switch at the time of the fire was located about the middle of the floor of the seed cleaning room. This was at the eastern terminus of the conveyor. The switch was put out of operation by the fire which destroyed the seed cleaning room. After the fire another switch was installed down at the western end because it was necessary to get the conveyor back into operation in order to move some grain that was in the large bins on the west side which was getting hot (Appendix page 72a).

When he learned from Arney's testimony that the switch which he had seen down at the western end of the quonset hut, on Sunday, had been placed there **after** the fire, Mr. Henry excepted to the testimony and said:

> "We make no contention about where the switch was then or now, never had made any contention about it" (Appendix p. 72a).

Whereupon, counsel for plaintiff explained that the reason he had questioned Mr. Arney to prove the fact of the re-location of the switch was Mr. Henry's opening statement that the defendants would prove that Nelson and Watts went down to the western end of the quonset hut where the switch was that operated the conveyor "with the hay and gasoline being two hundred feet away down at the eastern end." Mr. Henry, at this juncture, finding himself a helpless victim of his own imaginative faculties, then hastened to say:

> "Mr. Henry: It's an obvious misstatement. I believe I said the eastern end at one time and the western end the next. I didn't know when I made the opening statement and don't know now, and have never known where that switch is, have no idea where it is" (Appendix 73a).

Secondly, Mr. Henry had not the slightest basis for the statement in his opening statement that Nelson and Watts went down to the western end and started the fire in the following manner:

> ". . . with the hay and the gasoline being two hundred feet away at the eastern end, and they just put a little dab of hay right down on that conveyor belt, and then they struck a match to it, and then they just flicked the switch and as the belt just gradually took the hay and the fire down there to where the other hay and gasoline was, these men climbed a fence and ran away. That's what our proof is going to show you; that's why we won't pay."

It is manifest that the reason Mr. Henry made the statement was that the defendants had realized they were not in position to contend that the story which they had obtained from Nelson when they took his discovery deposition on March 16, 1960, was credible. They realized this,

when their witness Gray Ragsdale was on the stand during the first trial (if not before). When Ragsdale, on cross-examination, was asked what happened when gasoline is spread out on the floor and you strike a match, he answered, "It explodes." Quick as a flash, Mr. Henry came back with a hypothetical question:

> "Q. It doesn't explode if you put the lighted hay down two hundred feet away until this travels up the two hundred feet conveyor belt and gets there, does it?" (Tr. Vol. 2, page 320.)

This idea was a figment of Mr. Henry's resourcefulness and inventive turn of mind at the time the question was put to Ragsdale on the first trial. It was still nothing more than that when Mr. Henry made his opening statement to the jury on the second trial. It was utterly devoid of any evidentiary support.

The defendants were bound to the fantastic, preposterous, incredible story they obtained from Nelson on his discovery deposition. There was no other evidence on the second trial to support a verdict on the arson issue.

When the plaintiff objected to the reading of the discovery deposition of James Nelson on the ground that the story the defendants wanted to offer was "so inherently incredible or improbable or idiotic that nobody could believe it", the trial judge ruled that

> "The Court: That would (be) for the jury, the jury could believe that he was mistaken on that detail, and the general purport——
>
> "Mr. Farmer: It wouldn't be mistaken, that is the crux of the whole matter, it's the heart of it.
>
> "The Court: That's a jury question.
>
> "Mr. Farmer: No, sir.
>
> "The Court: They may not believe a word of it.
>
> . . . . . .

"The Court: Because it's unbelievable in that aspect, therefore, I should exclude the whole thing?

"Mr. Farmer: That's the heart of it. **That's the way he said he did it, and if the way he said he did it is so incredible that no one can believe it, no court is bound by incredible evidence.**

"The Court: He could be mistaken on that. He stepped out of the door, could have, and thrown a match inside and run away. I don't know. That's a matter for the jury." (Emphasis added.)

Tr. Vol. 3, 430-431.

James Nelson was called as a rebuttal witness by the plaintiff. He testified that he did not burn the mill (Tr. Vol. 6, page 1043). Mr. Joe W. Henry, Jr., cross-examined him as follows:

"Q. All right. But now, James, I want to go on a little bit. You are denying then that you went out there and climbed the fence and poured gasoline out and put the little hay on the conveyor belt here, lighted it, and threw the switch and then went out this side door here and came out?

A. That's right."

Tr. Vol. 6, page 1051.

Watts was called as a witness by the plaintiff. He testified that he did not go into the mill and set fire to it and that the story told by Nelson on his discovery deposition was untrue.

While R. C. Jones, called as a witness by the defendants, testified that he helped to haul gasoline down to the mill for Mr. Scales to have it burned and tried to implicate Nelson and Watts in setting fire to the mill, he gave no direct testimony that they did this.

So, unless the story told by Nelson on this discovery deposition is worthy of belief by reasonable men, there

would be no substantial evidence which would have supported a verdict for the defendants. If Nelson's testimony on the witness stand was believed the whole story was a mere concoction. Without the story told by Nelson on discovery, Jones' testimony would not support a verdict.

After all the evidence was in, the defendants had only the "idiotic" story told by Nelson on his discovery deposition with which to carry the burden of proving that Joe W. Scales procured the mill to be burned. Mr. Henry had told the jury on the first trial they should not be deceived

> ". . . about this idiotic argument that they took those milk cans and poured the gasoline right down in the floor, and stood there and struck a match. Of course that didn't happen and no one ever suggested that happened."

But that is precisely the story that the defense lawyers had obtained from Nelson and which they had him tell on his discovery deposition. And, according to the story, Nelson and Watts after they saw that the fire was going good—a raging inferno it would have been—walked right back out the same door by which they entered the room unsinged. (See Excerpts from Nelson's discovery deposition in Appendix.) Nothing like that has happened since the three Hebrew children, Shadrach, Meshach and Abednego, walked in the fiery furnace!

This Court, in **Pennsylvania Co. v. Whitney, 169 F. 572, 574**, stated:

> "it is . . . well settled that testimony contrary to reason, or contrary to natural or physical laws, cannot support a verdict."

In **Hasson v. Com. Int. Rev., 239 F. 2d 778, 782**, this Court, in an opinion written by Judge Martin, said:

[5] In answer to the argument of petitioners that certain uncontradicted testimony should have been accepted with finality by the Tax Court, we refer to the statement of Mr. Justice Field in Quock Ting v. United States, 140 U. S. 417, 420, 11 S. Ct. 733, 734, 35 L. Ed. 501, that there "may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony." Cf.

The Circuit Court of Appeals for the Eighth Circuit in **Elzig v. Gudwanger, 91 F. 2d 434,** stated the general rule that neither court nor jury is permitted to believe that which is obviously untrue, saying:

[7] The rule that oral evidence which is opposed to undisputed physical facts is not substantial evidence—which is another way of saying that neither court nor jury is permitted to believe that which is obviously untrue—is well settled. Missouri, K. & T. Ry. Co. v. Collier (C. C. A. 8), 157 F. 347, 353, certiorari denied 209 U. S. 545, 28 S. Ct. 571, 52 L. Ed. 920; St. Louis Southwestern Ry. Co. v. Britton (C. C. A. 8), 190 F. 316; American Car & Foundry Co. v. Kindermann (C. C. A. 8), 216 F. 499, 502; United States v. Harth (C. C. A. 8), 61 F. (2d) 541, 544; United States v. Hill (C. C. A. 8), 62 F. (2d) 1022, 1025; Ed S. Michelson, Inc. v. Nebraska Tire & Rubber Co. (C. C. A. 8), 63 F. (2d) 597, 600, certiorari denied 290 U. S. 634, 554 S. Ct. 52, 78 L. Ed. 551; Chicago, M., St. P. & P. R. Co. v. Linehan (C. C. A. 8), 66 F. (2d) 373, 380; Liggett & Meyers Tobacco Co. v. De Parcq (C. C. A. 8), 66 F. (2d) 678, 683; Jacobson v. Chicago, M., St. P. & P. R. Co. (C. C. A. 8), 66 F. (2d) 688, 693; Booth v. Gilbert (C. C. A. 8), 79 F. (2d) 790, 795; Blackley v. Powell (C. C. A. 4), 68 F. (2d) 457, 459; F. W. Woolworth Co. v. Davis (C.

C. A. 10), 41 F. (2d) 342, 347; Chambers v. Skelly Oil Co. (C. C. A. 10), 87 F. (2d) 853, 856.

Appellant does not suppose that the suggestion made by Judge Miller that Nelson could have been mistaken about how the fire was started with gasoline and hay will be persuasive with this Court. A jury's findings must be based on evidence and cannot be supported by such speculation as that Nelson could have stepped out of the door and thrown a match inside and run away. Judge Miller had not heard Nelson's discovery deposition read when he said that.

MOTION FOR HEARING EN BANC IN COURT OF APPEALS.

No. 17,871.

In the
UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Helen Corinne Scales Trice, Executrix Under the Will of Joe W. Scales, Deceased,
Plaintiff-Appellant,

vs.

Commercial Union Assurance Company, Ltd., et al.,
Defendants-Appellees.

Appeal From the United States District Court for the Middle District of Tennessee, Columbia Division.

Motion of Appellant for Hearing Before the Court En Banc.

Comes the Plaintiff-Appellant, Helen Corinne Scales Trice, Executrix under the Will of Joe W. Scales, De-

ceased, and moves that the hearing of this case be before the court en banc upon the following grounds:

1. This appeal follows the second trial of this case. There was an appeal following the first trial. The opinion of the Court on the first appeal is reported as **Helen Corinne Scales Trice, Executrix v. Commercial Union Assurance Company, Ltd., et al., 334 F. 2d 673.** On the first trial the jury returned a verdict in favor of the plaintiff-appellant. The trial judge set the verdict aside on the ground that the verdict was contrary to the great preponderance of the evidence on the issues of (1) arson and (2) fraud, false swearing, willful concealment or misrepresentation. His action was upheld under the rule that the granting of a new trial upon the ground that the verdict is contrary to the evidence is a matter resting in the sound discretion of the trial court and its action is not reviewable upon appeal except upon a showing of a clear abuse of discretion.

2. On the second trial, the jury failed to return a verdict on the arson issue but found for the defendant insurance companies on the issue of fraud, false swearing, etc. Plaintiff's motions for a directed verdict in her favor and for a judgment n. o. v. on both issues were denied by the trial court. Also her motion to reinstate the verdict on the first trial was overruled.

3. In the case of **Duncan v. Duncan, 377 F. 2d 49**, this Court, through a panel of three circuit judges, reversed the district court for an abuse of discretion in granting plaintiffs a new trial on the ground that the verdict was against the weight of the evidence when the defendant appealed from the final judgment in favor of the plaintiffs. The decision in this case was rendered on May 4, 1967. It was not cited in plaintiff-appellant's brief on this appeal because her counsel did not know of the decision when the brief was prepared and filed.

4. The panel which heard the first appeal in this case was composed of two district judges with only one circuit judge. The opinion was written by one of the district judges. In determining that there was no abuse of discretion by the trial court in granting the defendant's motion for a new trial, it was stated that there was substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing in the proof of loss and that he had participated in procuring the burning of the subject property. Appellant, in her brief, contends that an improper criterion was applied in passing on the question of abuse of discretion by the trial court, for this reason: the trial court would not have been authorized to set aside the verdict on the first trial merely because there was some substantial evidence upon which the jury might have returned a verdict for the defendant on the two issues. The defendant insurance companies had the burden of proving their defenses of felonious burning and fraud and false swearing by even more than a **preponderance** of the evidence. Yet, this Court, on its review of the record, did not find that the evidence preponderated against the verdict—only that the defendants had introduced substantial evidence on the two issues. The substantial evidence test has heretofore been applied to sustain the verdict of a jury and a judgment of the trial court thereon. For example, this Court in **Cutter v. Cincinnati Union Terminal Co., 361 F. 2d 637,** correctly and properly intimated that the appellate court—even where the trial judge has refused to set a verdict aside upon the ground that it is manifestly against the weight of the evidence—would not be bound to uphold his action if it found that the verdict is without any evidentiary support. Thus, in effect, the Court, in the **Cutter case** held that the trial court did not abuse his discretion in refusing to grant a new trial since there was some substantial evidence to support the verdict of the jury.

Appellant believes that the opinion as the first appeal applying the substantial evidence test to justify **overturning** the verdict of a jury in favor of a party carrying the burden of proof by even more than a mere preponderance of the evidence stands alone, and is insupportable by any principle.

5. Appellant says that on the decision of the first appeal in this case upholding the grant of a new trial to the insurance companies upon whom rested the burden of proof of their defense of fraud by a more than the mere preponderance of the evidence **(Equitable Life Assurance Soc. v. Johnson, 81 F. 2d 543)** upon the ground that there was some substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing is palpably erroneous. Moreover, this decision is in conflict with the rule applied by this Court in the **Cutter** and **Duncan** cases.

6. Appellant says that the importance of laying down the correct rule on the appeal in this case and bringing the former opinion in line with the recent decisions of this Court makes it imperative that the Court hear this case en banc, as the Court of Appeals for the Third Circuit did in **Lind v. Schenley Industries, Inc., 278 F. 2d 79,** and **Fassbinder v. Pennsylvania R. Co., 322 F. 2d 859.**

Respectfully submitted,

Fyke Farmer,

Attorney for Plaintiff-Appellant.

ORDER DENYING HEARING EN BANC.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Helen Corinne Scales Trice, etc., Plaintiff-Appellant, v. Commercial Union Assurance Company, Ltd., et al., Defendants-Appellees.	No. 17,871.

Order.

Upon consideration, it is Ordered that the motion for a hearing en banc be and it is hereby denied.

Entered by order of the Court.

Carl W. Reuss,
Clerk.